proceeding"; 2) the proceedings "implicate[] important state interests"; and 3) there is an adequate opportunity to raise constitutional challenges. *See id.* at 81. *See also Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 425-28, 435 (1982) (holding that abstention was appropriate when the New Jersey Ethics Committee conducted investigations into attorneys and had disbarment decisions briefed and argued before the State Supreme Court because New Jersey has a great interest in ensuring that attorneys under the New Jersey bar were acting ethically, and the attorneys under investigation had the opportunity to raise constitutional questions). Nevertheless, if a federal court determines that *Younger* abstention is appropriate pursuant to *Sprint* and *Middlesex*, the court maintains the discretion to hear a case if 1) there is bad faith on behalf of the state actor; 2) the state law is flagrantly unconstitutional; or 3) any additional "exceptional circumstance" applies. *See Middlesex*, 457 U.S. at 437; *Younger*, 401 U.S. at 53-54.

In this case, this Court should not invoke the abstention doctrine pursuant to *Younger* because the challenge enforcement action against Representative Smith does not fall within any of the *Sprint* categories for the *Younger* abstention doctrine to apply, and, even if it did, the circumstances of this case allow for discretionary intervention by the federal courts. Here, the challenge action is not a state criminal proceeding, nor is it a proceeding in which the state court is uniquely performing its functions; thus, the only *Sprint* category that this action could fall within would be a civil enforcement proceeding that is akin to a criminal prosecution. *See Sprint*, 571 U.S. at 72.

This case cannot be considered a civil proceeding that is akin to criminal prosecution under prong two of *Sprint*. *See id.* Instead, Representative Smith's case is analogous to *Sprint*, in which this Court held that the civil action at issue was not akin to a criminal prosecution. *See* 571

U.S. at 72-73, 78-80. In *Sprint*, the case before the court was between two private and the action was not initiated with the intent of sanctioning Sprint for any wrongful conduct, thus making it incomparable to a criminal prosecution. *See id.* at 78-80. Similarly here, private parties initiated the challenge against Representative Smith and are seeking to ensure that Representative Smith is constitutionally eligible to run for Congress, not to sanction him for conduct that occurred on January 6, 2021, demonstrating that this is akin to a civil proceeding and not a criminal prosecution. *See* Notice of Candidacy Challenge - Challenge to Const. Qualifications of Representative Sean Smith; R. at 1.

Representative Smith's case is also unlike *Huffman*, in which this Court held that an enforcement action was akin to a criminal prosecution when a sheriff and state prosecutor succeeded in a nuisance action against the Plaintiff for showing obscene films because the state interest in the civil case was the same interest the state has in enforcing criminal obscenity laws. *See* 420 U.S. at 595-98, 604-05, 611-13. Here, private voters brought the challenge action against Representative Smith, and, moreover, the state interest in the Challenge Statute is candidate eligibility, not prosecution, because voters can challenge a candidate's eligibility under the Challenge Statute pursuant to any state or federal law, not only those laws that also make one vulnerable to criminal prosecution. *See* Candidate Challenge Form; R. at 1; N.C. Gen. Stat. 107-18.3(a); R. at 1. Thus, the hearing conducted by the Superintendent of Elections cannot be equated to a civil proceeding that is akin to a criminal prosecution and fails under the second prong of *Sprint*.

If this Court were to find that the *Younger* abstention doctrine should apply pursuant to *Sprint*, this Court can still exercise its discretion to hear the case. In *Middlesex*, this Court held that flagrant unconstitutionality of a state law would permit federal courts to hear a case even if

abstention would be otherwise appropriate. *See* 457 U.S. at 437. The Challenge Statute is unconstitutional because it usurps the United States House of Representatives' sole authority to determine the qualifications of its members pursuant to Article I, Section V of the Constitution. *See* U.S. CONST. art. I, § 5. In *Middlesex*, this Court also retained discretion to hear a case for any "exceptional circumstance" that may arise—Representative Smith's case presents such a circumstance. *See* 457 U.S. at 437. If this Court abstains from hearing the case, the initial decision by the Superintendent of Elections regarding Representative Smith's eligibility will be rendered within one month. *See* N.C. Gen. Stat. 107-18.4, 107-18.6. However, the New Columbia Supreme Court need only "endeavor" to hear oral arguments within two weeks of the Superintendent's decision; the statute does not mandate when the State Supreme Court must make a final determination. *See id.* Thus, because the election is five weeks away, the election will come and go before Representative Smith has had his constitutional claims heard and decided—rendering a final decision by the state meaningless if he is kept off of the ballot this election cycle. *See* N.C. Gen. Stat. 107-18.6; R. at 1-2. Thus, this Court retains the discretion to hear this case given the exceptional circumstances contained within the nature of the issue.

Accordingly, this Court should reverse the dismissal of Representative Smith's complaint due to lack of Article III jurisdiction and *Younger* abstention because Representative Smith has suffered an injury by being subjected to proceedings arising out of the unconstitutional Challenge Statute, and the challenge is not akin a criminal prosecution thus making *Younger* abstention inappropriate.

Applicant Details

First Name	**Maitland Lilja Io**
Last Name	**Jones**
Citizenship Status	**U. S. Citizen**
Email Address	**cnh6gh@virginia.edu**
Address	**Address** Street **312 Alderman Road** City **Charlottesville** State/Territory **Virginia** Zip **22903** Country **United States**
Contact Phone Number	**9177972115**

Applicant Education

BA/BS From	**Dartmouth College**
Date of BA/BS	**June 2019**
JD/LLB From	**University of Virginia School of Law** **http://www.law.virginia.edu**
Date of JD/LLB	**May 19, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Virginia Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Kim, Annie
akim@law.virginia.edu
434-284-1214
Cahn, Naomi
ncahn@law.virginia.edu
(434) 924-4709
Schwartzman, Micah
schwartzman@law.virginia.edu
434-924-7848

This applicant has certified that all data entered in this profile and any application documents are true and correct.

MAITLAND LILJA IO JONES

312 Alderman Rd, Charlottesville, VA 22903 | cnh6gh@virginia.edu | (917) 797-2115

June 12, 2023

The Honorable Jamar K. Walker
United States District Court, Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a rising third-year student at the University of Virginia School of Law, and I am writing to apply for a clerkship in your chambers following my graduation in May 2024. I was recently selected as one of twenty-two American Constitution Society Next Generation Leaders nationwide and I plan to pursue a career in public service.

Enclosed please find a copy of my resume and my most recent transcript. I have also enclosed as a writing sample an essay awarded third place in the 2023 Freedom from Religion Foundation Essay Competition for Law School Students. Finally, included are letters of recommendation from Professor Annie Kim (434-243-4318), Professor Micah Schwartzman (434-924-7848), and Professor Naomi Cahn (434-924-4709).

Please feel free to reach out to me at the phone number or email above if I can offer further information. I appreciate your consideration.

Sincerely,

Io Jones

Io Jones

MAITLAND LILJA IO JONES

312 Alderman Rd, Charlottesville, VA 22903 | cnh6gh@virginia.edu | (917) 797-2115

EDUCATION

University of Virginia School of Law, Charlottesville, VA
J.D., Expected May 2024

- *Virginia Law Review*, Editorial Board
- American Constitution Society, Co-Director of Programming
- Public Interest Law Association, Shaping Justice Conference Co-Director
- If/When/How Lawyering for Reproductive Justice, Vice President
- Virginia Innocence Project Pro Bono Clinic, Volunteer
- Raven Society (selected by peers to join university's oldest honor society)
- Bracewell LLP Best Oral Argument Award

Dartmouth College, Hanover, NH
B.A., Geography (Minor: Public Policy), *cum laude*, June 2019

- Senior Independent Study: *A GIS Analysis of the Role of Crisis Pregnancy Centers in Women's Access to Reproductive Healthcare*

EXPERIENCE

WilmerHale, New York, NY & Washington, DC
Summer Associate, May 2023 – July 2023

The Lawyering Project, New York, NY
Legal Intern, May 2022 – July 2022

- Conducted legal research on issues of free speech, right to travel, and criminalization of pregnancy in support of ongoing reproductive rights litigation
- Drafted legal memoranda for clients on state legal and regulatory abortion law landscapes

Sullivan & Cromwell LLP, New York, NY
Litigation Paralegal, July 2019 – June 2021

- Prepared detailed materials for time-sensitive court hearings, filings, depositions, and a trial in a range of civil and criminal cases
- Managed program trackers, team docket updates, and case correspondence as sole legal assistant for pro bono cases on issues of access to justice, intimate partner violence, and education funding

Access Atlas, Remote
Co-Founder, April 2020 – June 2021

- Created website tracking access to reproductive health services during the COVID-19 pandemic
- Included on Sigma Awards 2022 Data Journalism Award Shortlist

Public Health Council of the Upper Valley, Lebanon, NH
Class of 1982 Upper Valley Community Impact Fellow, November 2018 – June 2019

- Designed, organized, and launched first Legislative Breakfast, bringing together state legislators from Vermont and New Hampshire to align public health legislative priorities
- Analyzed local public health data, conducted stakeholder focus groups, and drafted grant applications for launch of event

Global Health Policy Lab, Pristina, Kosovo
Health Policy Analyst, June 2018 – August 2018

Dartmouth College, Nelson A. Rockefeller Center for Public Policy, Hanover, NH
Policy Research Shop Analyst & First Year Fellow, June 2016 – June 2018

INTERESTS

Long-distance running, Olympic gymnastics, Brooklyn restaurants, data journalism

UNIVERSITY OF VIRGINIA
SCHOOL OF LAW

Name: Maitland Lilja Io Jones

Date: June 07, 2023
Record ID: cnh6gh

This is a report of law and selected non-law course work (including credits earned). This is not an official transcript.

Due to the global COVID-19 pandemic, the Law faculty imposed mandatory Credit/No Credit grading for all graded classes completed after March 18 in the spring 2020 term.

		FALL 2021			
LAW	6000	Civil Procedure	4	B+	Woolhandler,Nettie A
LAW	6002	Contracts	4	A-	Nachbar,Thomas B
LAW	6003	Criminal Law	3	B+	Bonnie,Richard J
LAW	6004	Legal Research and Writing I	1	S	Buck,Donna Ruth
LAW	6007	Torts	4	B+	Abraham,Kenneth S
		SPRING 2022			
LAW	7624	Virginia/Constitution (SC)	1	A-	Howard,A. E. Dick
		SPRING 2022			
LAW	6001	Constitutional Law	4	B+	Mahoney,Julia D
LAW	6104	Evidence	4	A-	Mitchell,Paul Gregory
LAW	7088	Law and Public Service	3	A	Kim,Annie
LAW	6005	Lgl Research & Writing II (YR)	2	S	Buck,Donna Ruth
LAW	6006	Property	4	A-	Schragger,Richard C.
		FALL 2022			
LAW	9008	Children and the Law	3	A-	Block Jr.,Andrew K.
LAW	7017	Con Law II: Religious Liberty	3	A	Schwartzman,Micah Jacob
LAW	7009	Criminal Procedure Survey	4	B+	Harmon,Rachel A
LAW	7202	Poverty,Law &Access to Justice	3	A-	Cahn,Naomi Renee
		SPRING 2023			
LAW	7788	Science and the Courts (SC)	1	A	Rakoff,Jed S
		SPRING 2023			
LAW	6102	Administrative Law	3	A-	Woolhandler,Nettie A
LAW	8003	Civil Rights Litigation	3	A-	Frampton,Thomas Ward
LAW	8657	Decarceration & Reentry Clinic	4	H	Orians,Kelly
LAW	7071	Professional Responsibility	2	B+	Faglioni,Kelly
LAW	7786	Topics in Law, Med & Soc (SC)	1	A-	Shepherd,Lois L.

June 05, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write with great enthusiasm to recommend Io Jones, a rising third-year student at the University of Virginia School of Law, for a clerkship in your chambers. I've known Io since her first year of law school, both as a student in my class and as a student leader whom I've advised. In both capacities I have been struck by Io's remarkable combination of intellectual rigor, organizational acumen, and social grace. She is the Vermeer of law students—meticulous and observant, dedicated to craft.

I met Io during her first semester of law school as a fellow in the curricular program I direct, the Program in Law and Public Service. The following spring, in my Law and Public Service seminar, Io distinguished herself as one of the most original contributors to class discussion. While many of her peers tended to voice values-driven opinions about our readings, Io inspected every angle of an issue with objectivity and fairness. She displayed a gift for seeing things in their full context. Because of her tactfulness and self-awareness, moreover, she could communicate her vision in a way that rankled no one. This intellectual rigor in classroom discussions also manifested in her writing. In her final paper—analyzing court-ordered detentions of juveniles for status offenses in Arkansas—Io managed to crunch a tremendous amount of data, court practices, and advocacy approaches into a beautifully crafted policy brief. It received the second highest score in a class of forty-four and resulted in Io earning one of a small handful of As for the semester.

My respect for Io grew last year through my work with her as co-director of the annual Shaping Justice Conference. Because the conference was transitioning to being completely student-run, Io and her two co-directors faced unique organizational and funding challenges. From the first meeting I had with the co-directors, however, I realized that the work was in good hands with Io. In the most graceful way possible, Io took the reins by broaching how the co-directors might best organize their efforts and offering her assistance to schedule meetings. Later in the year, Io was instrumental in advocating for more funding to the administration—again, with tact and reasonableness. I was thoroughly impressed by how expertly Io managed the entire, nearly year-long planning process, from collaborating with dozens of student organizers to interfacing with the administration and conference speakers. Ultimately, due largely to Io's vision and hard work, the conference proved a resounding success. Development of the conference theme, "Safeguarding Bodily Autonomy: Examining the Intersections of Health and Justice," also benefitted greatly from Io's knowledge and experience in reproductive justice and racial justice matters. And, at the conference itself, Io delivered polished remarks welcoming attendees at the plenary session.

It bears noting that although I observed Io working tirelessly on the Shaping Justice Conference, she also served during the same year in a number of other high-profile and time-intensive leadership positions. Both our American Constitution Society and If/When/How chapters were extremely active last year in their programming. Io was at the heart of those efforts. This was in addition to serving as a peer advisor to a section of 1L students—both an honor at UVA Law and a significant time commitment, as any peer advisor will attest. When I asked Io how she balanced so many roles with her academics, she shrugged it off by saying that she approaches her law school commitments like a job. Perhaps the demands of law school pale in comparison to the rigorous training she pursued throughout childhood as a nationally competitive gymnast. Whatever the sources of Io strength may be, though, I am in awe of the person she has become. And I have no doubt that Io will prove to be a brilliant, valuable, well-liked clerk to any judge who is lucky enough to have her.

Thank you for giving her your strong consideration. Please let me know if I may provide any additional information about Io.

Sincerely,

Annie Kim
Assistant Professor of Law, General Faculty
Director, Program in Law & Public Service

June 05, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am delighted to write this letter in support of the application of Maitland Lilja Io Jones, a rising third year student here at the University of Virginia School of Law. I recommend her with great enthusiasm.

Ms. Jones was a student in my co-taught Poverty Law course during the fall of 2022, where I had the opportunity to get to know her well. Throughout out the semester, Ms. Jones was an active participant with strong contributions to class discussions; her comments were astute, providing students, as well as the co-instructors, with significant insight into the class material. The course involved both cooperative work on projects with other students as well as an individual final strategic memo on a topic chosen by the student. For Ms. Jones, that final project involved an analysis of poverty law and intimate partner violence (IPV), along with recommendations on improving local responses to IPV. To prepare the memo, Ms. Jones engaged in extensive research both within the library and outside of it. The memo was excellent: well-written, clearly organized, and organized. Ms. Jones was one of our top students. Based on the tight University of Virginia School of Law grading curve, she received an A-, the highest grade we gave students.

Indeed, I was so impressed with Ms. Jones's performance during the semester that I hired her as my research assistant during the spring of 2023. The work involved preparing an historical analysis of legal approaches to minors' access to abortion. As was true of the memo she wrote for the poverty law course, this one was thoroughly-researched and superbly-crafted. It not only answered the questions I had posed for her but also pointed the way forward for my further development of the issues in a forthcoming article.

It is no surprise to me that Ms. Jones is serving on the editorial board of the Virginia Law Review, given the strength of her research, writing, and organizational skills as well as her diligence and discipline. I appreciate how she has balanced her editorial work with all of the other activities in which she is a student leader.

As I saw during class and during her work with me, Ms. Jones is conscientious, engaging, and mature. I have valued the opportunity to work with her, and I very much hope that she will continue to serve as my research assistant during her third year. Ms. Jones has the rare combination of being able to focus on both the details and the larger picture. I have no doubt whatsoever that you would find her quick intellect, superb writing ability, and powerful sense of purpose to be great assets. I have complete confidence that she will make an excellent law clerk.

Please do not hesitate to contact me if you have any questions or need additional information.

Sincerely,

Naomi Cahn
Justice Anthony M. Kennedy Distinguished Professor of Law
Nancy L. Buc '69 Research Professor in Democracy and Equity
Co-Director, Family Law Center
ncahn@law.virginia.edu
(434) 924-4709

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing on behalf of Maitland Lilja Io ("Io") Jones, who has applied for a clerkship in your chambers. For the past fifteen years, I have chaired the faculty clerkships committee at Virginia. In that capacity, I have worked with hundreds of applicants, including many of our strongest students. Every year, there are a few who stand out. In the Class of 2024, Io has distinguished herself as one of them. She is fabulous, and I recommend her to you with the greatest enthusiasm.

Io is a student leader, which is how I first got to know her. After the Supreme Court decided Dobbs, I was trying to get a better sense of how much student interest there might be in courses on reproductive rights. When I asked students who I should talk to, they all pointed to Io. She had spent her summer at The Lawyering Project, a small reproductive justice litigation nonprofit, and she was organizing events at UVA, including an early program on the aftermath of Dobbs that drew more than a hundred students.

Io has made enormous contributions to our intellectual community at Virginia. She directs programming for the UVA chapter of the American Constitution Society and was recently selected by ACS to be a Next Generation Leader. She is currently co-directing the Shaping Justice Conference for the Public Interest Law Association. She also works with the National Lawyers Guild, the Virginia Innocence Project, and is a Peer Advisor.

You might think that all this public service work would trade off with Io's academics, but she has excelled there, too. Io is an editor of the Virginia Law Review, and her GPA of 3.59 is well above our mean. Given her work ethic and intellectual ability, I would expect her to finish in the top 25% of her class.

Not to bury the lede, but Io also wrote the best paper in my course, Constitutional Law II: Religious Liberty, in the fall of 2022. I did not give an A+ that semester, but if I had, she would have received it. She had the top grade in the class. I had 72 students that semester, including most of the top-25 in the second-year class. I allow a paper option instead of a traditional exam, and 20 students chose to exercise it. At least one of those papers will be published as a note by the Virginia Law Review, and another was recently recognized in a writing competition sponsored by the Program on Church, State, and Society at Notre Dame Law School. But in my view, Io's paper was the clear standout. She wrote about the importance of state constitutional law in religious freedom challenges to restrictions on abortion. It is excellent work, and I have encouraged her to develop it for publication.

On the strength of her writing, and given the depth of her work on reproductive rights, I hired Io as part of a team of research assistants. I wanted a better understanding of the legislative history of abortion bans, especially in states with trigger laws. Perhaps unsurprisingly, Io quickly became the effective leader of this research team. She is self-motivated and industrious. Her work produced all sorts of interesting leads and has opened up new avenues for research.

One topic that emerged from Io's work focuses on the role of artificial reproduction, especially in vitro fertilization (IVF), in challenging abortion bans. I asked her to write a memo for me on this topic. She responded with an excellent overview of the arguments, and I suggested that she use it as the basis for a paper. She wrote up a short version, entitled "The IVF Exception: A Stronger Free Exercise Challenge to Abortion Bans," which was recently published online, after winning third place (and $2000) in a student writing competition sponsored by the Freedom From Religion Foundation.

On a personal note, if you decide to meet her, I think you will find Io to be delightful and wonderfully engaging. She listens carefully and then gets to work. In my research team, she was cooperative and well-liked by the others. I think she would get along with just about anyone, and, in chambers, other clerks will appreciate her professionalism, dependability, and sound judgment.

As you can tell, I am a big fan of Io Jones. She is going to have a brilliant career in the law. There is so much to like about her. I could keep going, but I hope you will give her the chance to talk with you herself. If you do, and if you see even part of the excitement and energy that I have, I suspect that hiring her will be easy. There is really no risk here, and her potential is tremendous.

Have a close look at Io. I think she is going to impress anyone who gives her the chance.

Sincerely,

/s/

Micah J. Schwartzman
Hardy Cross Dillard Professor of Law
Roy L. and Rosamond Woodruff Morgan
Professor of Law

Micah Schwartzman - schwartzman@law.virginia.edu - 434-924-7848

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MAITLAND LILJA IO JONES

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WRITING SAMPLE

This writing sample is an essay awarded third place in the 2023 Freedom from Religion Foundation Essay Competition for Law School Students. The competition asked current law school students to write an essay making the strongest argument possible under the current caselaw that a law banning or restricting abortion should be invalidated based on the religious liberty interests of a potential plaintiff.

THE IVF EXCEPTION: A STRONGER FREE EXERCISE CHALLENGE TO ABORTION BANS

INTRODUCTION

The recent direction of religious liberty jurisprudence suggests that a "most favored nation" ("MFN") status argument may be available for free exercise claims challenging state abortion bans.[1] The United States Supreme Court has held that laws must treat religious activity as "most favored," or at least not *less* favored, than comparable secular activity. Thus, when a state allows exceptions to abortion bans for secular conduct, but not comparable religious conduct, a free exercise challenge should trigger strict scrutiny.

This Essay argues that the free exercise argument for challenging abortion bans may be strengthened by pointing out states' inconsistency in allowing in vitro fertilization (IVF) while also banning abortion—referred to here as the "IVF exception." Other scholarship has examined how "medical exceptions" and "rape and incest exceptions" undermine a state's purported interest in "fetal life." This Essay argues that the "IVF exception" is far more damaging to a state's purported compelling interest in "fetal life." Ultimately, the only way for a state to remedy the lack of a narrowly tailored compelling interest, when subjected to strict scrutiny in the free exercise challenge context, would be to re-legislate abortion bans to explicitly ban IVF. Some states have already made clear that their abortion bans do not and will not ban IVF, and the high political costs of banning IVF make this kind of re-legislation highly unlikely, if not impossible in some states. The inconsistency reveals the real motivating force: states are interested in controlling reproductive autonomy some contexts, but fear political backlash in others.

[1] At least one trial court has vindicated this kind of argument. *See* Order Granting Plaintiffs' Motion for Preliminary Injunction, *Anonymous Plaintiff 1, et al. v. Individual Members of the Medical Licensing Bd. of Ind.* (Marion Cnty. Super. Ct. Dec. 2, 2022).

This Essay proceeds in three Parts. Part I provides a brief overview of the "MFN" status argument in the context of abortion bans and analyzes the strength of the "medical exception" and "rape and incest exceptions" arguments. Part II analyzes the "IVF exception" argument and posits that the "IVF exception" is the most damaging to a states' purported narrowly tailored compelling interest. Part III provides brief conclusions and suggests that litigants in the wake of *Dobbs v. Jackson Women's Health Organization* ought to focus on this inconsistency to challenge abortion bans with free exercise claims.

I. SECULAR EXCEPTIONS AND THE "MOST FAVORED NATION" STATUS ARGUMENT

A "MFN" style argument exists to vindicate religious free exercise claims in the abortion ban context. Abortion bans may be challenged for lacking general applicability. The Supreme Court recently held that government regulations are not neutral and generally applicable, and thus must trigger strict scrutiny, "whenever they treat *any* comparable secular activity more favorably than religious exercise."[2] Strict scrutiny requires a narrowly tailored compelling state interest—which the Court has held can be undermined and even defeated by the secular exceptions that give rise to strict scrutiny in the first place.[3]

Nearly all states with total abortion bans explicitly use some variation of the language "to protect fetal life" as their interest in banning abortion.[4] However, all existing state abortion bans currently include some secular exceptions. All states allow for the "medical exception," in circumstances when an abortion is necessary to save the life of the pregnant person.[5] Some states also allow exceptions for rape and incest. Secular exceptions ought to trigger strict scrutiny

[2] Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021).
[3] *Id.* at 1298.
[4] *See, e.g.,* Ark. Code Ann. § 5-61-302(a)(8) (The introductory section of the Arkansas Human Life Protection Act declares the "Arkansas Constitution, Amendment 68, states that the policy of Arkansas is to protect the life of every unborn child from conception until birth.")
[5] *State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST. (Feb. 1, 2023), https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions.

under *Tandon*. Furthermore, this Essay argues that the "IVF exception" is the strongest for triggering strict scrutiny and finding that a state's interest in "fetal life" is not narrowly tailored.

a. Medical Exception

The "medical exception" allows for abortion in circumstances where the life of the pregnant person is at risk. Focusing on this exception suffers from a clear deficiency; some courts will find that the state has an independent compelling interest in the medical exception, and as a result, this exception will not be comparable under the MFN analysis.

b. Rape and Incest Exceptions

Some states with near-total abortion bans provide exceptions in cases of rape or incest.[6] Focus on the "rape and incest exceptions" suffers from two flaws. First, some states will "level down" and simply remove the exceptions if challenged by these claims. Though there is strong political support for rape and incest exceptions,[7] many state abortion bans reject them, and some conservative states will likely re-legislate abortion bans with no exceptions. Second, though political support for these exceptions exists, the numbers of abortions obtained in circumstances of rape and incest are relatively low, and political support for these exceptions, though strong, is diffuse—at least when compared to support for IVF.

II. The IVF Exception Argument

a. Current Status of IVF in States with Abortion Bans

In vitro fertilization (IVF) is a common fertility treatment in which eggs are collected from a patient's ovaries and fertilized with sperm in a lab to create embryos.[8] The resulting

[6] *Id.*
[7] Stephanie Perry et al., *Vast majority of Republicans support abortion exceptions for rape, incest and mother's health*, NBC (Oct. 17, 2022, 8:52AM), https://www.nbcnews.com/politics/2022-election/vast-majority-republicans-support-abortion-exceptions-rape-incest-moth-rcna52237.
[8] Michelle Jokisch Polo, *Infertility patients fear abortion bans could affect access to IVF treatment*, NPR (July 21, 2022, 5:04AM), https://www.npr.org/sections/health-shots/2022/07/21/1112127457/infertility-patients-fear-abortion-bans-could-affect-access-to-ivf-treatment.

embryos (fertilized eggs) are either transferred to a uterus, discarded, or frozen to be used later.[9] While scholars and activists have raised concerns that abortion bans could pose a threat to the legality of IVF, there has been little attention paid to the way in which exceptions for IVF might undermine the state's purported interest in "protecting fetal life."

All the states that currently ban abortion simultaneously allow IVF.[10] Abortion ban statutory language is often unclear. For example, in some states it appears that statutory language banning abortion *could* apply to embryos created in the IVF process.[11] Yet, in states with ambiguous statutes, the states' attorneys general have either said explicitly that the abortion ban does not apply to IVF or remained silent on the issue.[12]

b. IVF and the Most Favored Nation Status Argument

States that ban abortion but allow IVF are clearly inconsistent in their application of the claimed interest in protecting "fetal life." The legality of IVF parallels current secular exceptions, such as rape and incest exceptions, in showing that state abortion bans are underinclusive and lack general applicability. Here, IVF can be considered another "secular exception" to abortion bans because IVF requires the discarding of embryos. Under *Tandon*, the "comparability is

[9] *Id.*
[10] *States' Abortion Laws on Reproductive Medicine*, AM. SOC'Y. REPRODUCTIVE MED. (Oct. 10, 2022), https://www.asrm.org/news-and-publications/asrms-response-to-the-dobbs-v-jackson-ruling/dobbs/state-law-summaries/.
[11] *See, e.g.,* Ark. Code § 5-61-303. The Arkansas statute banning abortion bans all abortions with one exception, to save the life of the pregnant person in a medical emergency. Ark. Code § 5-61-304. The statute defines "unborn child" as "an individual organism of the species Homo sapiens *from fertilization* until live birth." Ark. Code § 5-61-303 (emphasis added). Thus, it appears that this ban could apply to the discarding of embryos (fertilized eggs), whether in utero or not. However, Arkansas' Attorney General Leslie Rutledge told NBC News that the abortion ban has "no implications for IVF treatments." Aria Bendix, *States say abortion bans don't affect IVF. Providers and lawyers are worried anyway.*, NBC (June 29, 2022, 12:56PM), https://www.nbcnews.com/health/health-news/states-say-abortion-bans-dont-affect-ivf-providers-lawyers-worry-rcna35556.
[12] For example, though Oklahoma's abortion ban does not explicitly refer to IVF, the Oklahoma Attorney General issued a letter of guidance on the state's abortion laws in September 2022, explicitly stating that civil and criminal abortion laws in Oklahoma do not apply to IVF. Attorney General O'Connor Releases Guidance for Law Enforcement After Newest Abortion Law Takes Effect, https://www.oag.ok.gov/articles/attorney-general-o'connor-releases-guidance-law-enforcement-after-newest-abortion-law-takes.

concerned with the risks various activities pose, not the reasons why people [participate in those activities]."[13] In comparing the disposal of embryos in the IVF context to an abortion obtained at the embryonic stage, the "risks…[these] activities pose" to the state's interest are exactly the same.

By the numbers, the IVF exception raises far stronger concerns for the state's claimed compelling interest in protecting "fetal life" than medical or rape/incest exceptions. According to the CDC, there were 620,327 abortions nationally in 2020 in the District of Columbia and 47 states.[14] Studies have shown that one percent of people obtain abortions due to rape and less than one percent of people obtain abortions due to incest.[15] In contrast, the numbers of discarded embryos resulting from IVF procedures are far higher, with some researchers estimating hundreds of thousands annually.[16] Additionally, estimates consistently state that tens of thousands of embryos are "abandoned" in fertility clinics every year.[17] One study estimated there are 1.4 million embryos in storage in the United States, though it is difficult to identify what percentage of these embryos are "abandoned" due to competing definitions of the term.[18] Further, when compared with abortion, IVF is underregulated, and multiple accidents at fertility clinics and embryo storage centers have led to the loss of thousands of stored embryos.[19]

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[13] 141 S. Ct. 1294, 1296.
[14] Jeff Diamant & Besheer Mohamed, *What the data says about abortion in the U.S.*, PEW RSCH. CTR. (Jan. 11, 2023), https://www.pewresearch.org/fact-tank/2023/01/11/what-the-data-says-about-abortion-in-the-u-s-2/.
[15] Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, GUTTMACHER INST. (2005), https://www.guttmacher.org/sites/default/files/pdfs/pubs/psrh/full/3711005.pdf.
[16] Bess Andrews, *Stem cell lines created from discarded IVF embryos*, THE HARV. GAZETTE (Jan. 30, 2008), https://news.harvard.edu/gazette/story/2008/01/stem-cell-lines-created-from-discarded-ivf-embryos/.
[17] *Tens of thousands of embryos are stuck in limbo at fertility clinics*, CBS (Jan. 17, 2019, 12:36PM), https://www.cbsnews.com/news/embryos-are-stuck-in-limbo-in-fertility-clinics/; Liz Tung, *After IVF, what happens to remaining embryos?*, NPR (Mar. 15, 2019), https://whyy.org/segments/after-ivf-what-happens-to-remaining-embryos/.
[18] *Tens of thousands of embryos are stuck in limbo in fertility clinics*, CBS (Jan. 17, 2019, 12:36PM), https://www.cbsnews.com/news/embryos-are-stuck-in-limbo-in-fertility-clinics/.
[19] Naomi Cahn & Dena Sharp, *The fertility industry is poorly regulated – and would-be parents can lose out on having children as a result*, THE CONVERSATION (Aug. 23, 2021, 2:37PM), https://theconversation.com/the-fertility-industry-is-poorly-regulated-and-would-be-parents-can-lose-out-on-having-children-as-a-result-163792; Amel

States struggle to distinguish their compelling interest in "fetal life" during a pregnancy from the interest states might be expected to have in protecting "fetal life" of embryos created during IVF. Tennessee, for example, has distinguished between abortion and the discarding of embryos that takes place during IVF by distinguishing *where* the embryo is when discarded (comparing an embryo "created outside a woman's body" with an embryo "'living. . . within' a woman's body.")[20] The argument that the *location* of the embryo leads to a dramatically different state interest in "fetal life" is weak, particularly when research has shown that embryos have the potential for successful pregnancies and birth even after decades of freezing.[21] It is unclear how states can argue that some "fetal life" is worth protecting when other "fetal life" is not. The inconsistency appears to reveal a true motive in controlling reproductive autonomy in certain circumstances.

III. CONCLUSION

Inconsistency in how state laws treat "fetal life" under abortion bans versus in the IVF context undermines the purported compelling interest in protecting "fetal life"—and states have been unable to explain this inconsistency. Furthermore, states will struggle to re-legislate abortion bans to ban IVF, or to change disposal practices, without facing powerful and well-

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Ahmed, *Prospective Parents in Limbo After 2 Accidents Destroy Fertility Clinic Embryos*, KQED (Mar. 16, 2018), https://www.kqed.org/futureofyou/440245/accidents-destroy-embryos-at-2-fertility-clinics-on-same-day; Laurel Wamsley, *Ohio Fertility Clinic Says 4,000 Eggs And Embryos Destroyed When Freezer Failed*, NPR (Mar. 28, 2018), https://www.npr.org/sections/thetwo-way/2018/03/28/597569116/ohio-fertility-clinic-says-4-000-eggs-and-embryos-destroyed-when-freezer-failed.

[20] The full Tennessee attorney general's Opinion from October 2022 on the matter states: "Disposing of an embryo that was created outside a woman's body and that has never been transferred to a woman's body thus does not qualify as "abortion." Id. § 39-15-213(a)(1). Such an embryo may fit the Act's definition of "[u]nborn child," id. § 39-15-213(a)(4), but the Act does not prohibit the embryo's disposal unless and until it is "living . . . within" a woman's body, id. § 39-15-213(a)(3). Only then can the embryo's gestation render a woman "[p]regnant," id., and if there is no "pregnancy" to "terminate," there can be no "abortion," id. § 39-15-213(a)(1)." State of Tennessee Office of the Attorney General, Opinion No. 22-12 (Oct. 20, 2022), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2022/op22-12.pdf.

[21] Sarah Zhang, *A Woman Gave Birth From an Embryo Frozen for 24 Years*, THE ATLANTIC (Dec. 21, 2017), https://www.theatlantic.com/science/archive/2017/12/frozen-embryo-ivf-24-years/548876/.

organized political backlash. In the wake of *Dobbs*, litigants have an opportunity to challenge states that allow IVF but simultaneously ban abortion. These states have laws that are not generally applicable or narrowly tailored to protect "fetal life," which means that they "disvalue" and discriminate against religious reasons for abortion in violation of the First Amendment.

Applicant Details

First Name	**Victoria**
Last Name	**Jones**
Citizenship Status	**U. S. Citizen**
Email Address	**victoria.jones@law.ua.edu**
Address	**Address** Street **2311 5th St E** City **Tuscaloosa** State/Territory **Alabama** Zip **35404** Country **United States**
Contact Phone Number	**3072994834**

Applicant Education

BA/BS From	**University of Colorado-Colorado Springs**
Date of BA/BS	**May 2021**
JD/LLB From	**The University of Alabama School of Law** **http://www.law.ua.edu**
Date of JD/LLB	**May 10, 2024**
Class Rank	**50%**
Law Review/Journal	**Yes**
Journal(s)	**Journal of the Legal Profession**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Gold, Russell
rgold@ua.edu
205-348-1139
Grove, Tara
tgrove@law.utexas.edu
Krotoszynski, Ronald
rkrotoszynski@law.ua.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am a student at the University of Alabama School of Law. I am writing to express my interest in your chambers for the 2024-2025 term. I am an Articles Editor on the Journal of the Legal Profession and interned for Chief Judge L. Scott Coogler over the previous summer.

My summer jobs have provided me with experience in legal writing in a variety of practice areas, including transactional law and litigation, and strengthened my research skills. As a research assistant, I have become well versed in using Westlaw and Lexis to identify relevant laws and articles to resolve issues and stay up to date on emerging legal developments. In my in-house counsel position at Randall-Reilly, I gained experience in legal writing by drafting contracts for employees, vendors, and customers. As a summer clerk at Fidelity National Title Insurance, I have strengthened my research abilities by completing research projects covering different states and a variety of legal issues. My research and writing abilities help me multitask and stay on top of heavy workloads, and will make me an effective Articles Editor on the Journal of the Legal Profession this fall. In my law clerk internship with Judge Coogler, I practiced applying case law to real cases and legal writing to resolve issues. This experience solidified my interest in clerking after graduating from law school. These abilities will enable me to meaningfully contribute to your chambers.

I have attached my resume and most recent transcript. Letters of recommendation from Professor Gold, Professor Grove, and Professor Krotoszynski are enclosed as well. I have also included a copy of my seminar paper, for which I conducted empirical research. Thank you for your consideration.

Sincerely,

Victoria Jones

VICTORIA JONES

2311 5th St E
Tuscaloosa, AL 35404
307-299-4834
Victoria.jones@law.ua.edu

EDUCATION

The University of Alabama School of Law Tuscaloosa, AL
Juris Doctor Candidate, May 2024

- GPA: 3.30
- *Journal of the Legal Profession*, Articles Editor
- If/When/How, Secretary
- Latinx Law Student Association, Secretary
- Business Law Society, Member
- Federalist Society, Member
- Student Animal Legal Defense Fund, Member
- First Generation Lawyer's Association, Member

University of Colorado at Colorado Springs Colorado Springs, CO
Bachelor of Science, *magna cum laude*, in Marketing, May 2021

- GPA: 3.71
- Honors: National Society of Leadership and Success; Dean's List; President's List
- Pre-Law Society

EXPERIENCE

Fidelity National Title Insurance Omaha, NE
In-House Counsel Summer Clerk, May-July 2023

- Completed research projects to assist assigning attorneys with coverage claims
- Made coverage determinations on live claims from title insurance customers

Chief Judge L. Scott Coogler, Northern District of Alabama Tuscaloosa, AL
Law Clerk, July-August 2022

- Observed courtroom proceedings
- Drafted opinion on a motion to compel arbitration

Randall-Reilly Tuscaloosa, AL
In-House Counsel Summer Extern, May-July 2022

- Reviewed contracts with independent contractors, sales vendors, and customers
- Researched and drafted memoranda on emerging contract law issues
- Submitted recommendations to counsel and customers under attorney's supervision

COMMUNITY SERVICE

Natrona County High school, Volunteer Speech and Debate Judge
Beagle Freedom Project, Volunteer
Tuscaloosa Metro Animal Shelter, Volunteer
Habitat for Humanity Wills Clinic, Volunteer

ADDITIONAL INTERESTS

Ballroom dancing, volunteering with animals, traveling to national parks

12175716 Victoria Jones
Jun 10, 2023 07:04 pm

Academic Transcript

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Institution Credit Transcript Totals Courses in Progress

Transcript Data

STUDENT INFORMATION

Name : Victoria Jones

Curriculum Information

Current Program:
Juris Doctor
College: Law School
Major and Department: Law, Law

This is NOT an Official Transcript

INSTITUTION CREDIT **-Top-**

Term: Fall 2021
Major: Law
Academic Standing: Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	602	LW	Torts	B+	4.000	13.320	
LAW	603	LW	Criminal Law	A-	4.000	14.680	
LAW	608	LW	Civil Procedure	B+	4.000	13.320	
LAW	610	LW	Legal Research/Writing	B-	2.000	5.340	
LAW	713	LW	Intro to Study of Law	P	1.000	0.000	

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	14.000	46.660	3.333
Cumulative:	15.000	15.000	15.000	14.000	46.660	3.333

Term: Spring 2022
Major: Law
Academic Standing: Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	600	LW	Contracts	B-	4.000	10.680	
LAW	601	LW	Property	B	4.000	12.000	
LAW	609	LW	Constitutional Law	A-	4.000	14.680	
LAW	648	LW	Legal Research/Writing II	B	2.000	6.000	
LAW	742	LW	Legislation and Regulation	B-	2.000	5.340	

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	16.000	16.000	16.000	16.000	48.700	3.044
Cumulative:	31.000	31.000	31.000	30.000	95.360	3.179

Term: Summer 2022

Major: Law
Academic Standing: Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	634	LW	Externship	P	6.000	0.000	

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	6.000	6.000	6.000	0.000	0.000	0.000
Cumulative:	37.000	37.000	37.000	30.000	95.360	3.179

Term: Fall 2022

Major: Law
Academic Standing: Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	644	LW	Decedents Estates Trusts Plan	A-	3.000	11.010	
LAW	662	LW	Secured Transactions	B	3.000	9.000	
LAW	724	LW	Banking Law	A	3.000	12.000	
LAW	727	LW	Bankruptcy	B+	3.000	9.990	
LAW	776	LW	Sales Law	A	2.000	8.000	

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	14.000	14.000	14.000	14.000	50.000	3.571
Cumulative:	51.000	51.000	51.000	44.000	145.360	3.304

Term: Spring 2023

Major: Law
Academic Standing: Standing Undetermined

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	645	LW	Business Organizations	P	3.000	0.000	
LAW	683	LW	Administrative Law	B	3.000	9.000	
LAW	684	LW	Antitrust Law	B+	3.000	9.990	
LAW	735	LW	Criml Procedure Pretrial	B+	3.000	9.990	
LAW	818	LW	Advanced Contracts Seminar	A-	2.000	7.340	

Term Totals (Law)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	14.000	14.000	14.000	11.000	36.320	3.302
Cumulative:	65.000	65.000	65.000	55.000	181.680	3.303

TRANSCRIPT TOTALS (LAW) **-Top-**

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution:	65.000	65.000	65.000	55.000	181.680	3.303
Total Transfer:	0.000	0.000	0.000	0.000	0.000	0.000
Overall:	65.000	65.000	65.000	55.000	181.680	3.303

COURSES IN PROGRESS **-Top-**

Term: Fall 2023

Major: Law

Subject	Course	Level	Title	Credit Hours
LAW	642	LW	Evidence	3.000
LAW	660	LW	Legal Profession	3.000
LAW	674	LW	Family Law I	3.000
LAW	741	LW	Federal Government Contracts	3.000

RELEASE: 8.7.1

UNOFFICIAL TRANSCRIPT

NAME: Jones, Victoria
STUDENT NR: XXX-XX-7854/109675194 BIRTHDATE : 12/01/XXXX
PRINT DATE: 12/15/2021

Degrees, Certificates and Licensure

Bachelor of Science MAY 15, 2021
CU Colorado Springs
Coll of Business & Admin UGRD
Degree Honors: Magna Cum Laude
Major : Business
Option : Marketing Emphasis

Other Institutions Attended:

SECONDARY SCH : Campbell County High School
GRAD: XX/XXXX
Gillette WY

HIGHER EDUC. INSTITUTIONS: Northern WY Comm Coll Dist
Gillette WY 09/14 - 12/15

Western Dakota Tech Inst
Rapid City SD 01/19 - 05/19

Montana State Univ-Billings
Billings MT 01/18 - 05/19

Transfer,Test and/or Study Abroad Credit Applied:

Northern WY Comm Coll Dist
Sheridan WY
UGRD SEM TRANSFER CREDIT 10.0

Western Dakota Tech Inst
Rapid City SD
UGRD SEM TRANSFER CREDIT 6.0

Montana State Univ-Billings
Billings MT
UGRD SEM TRANSFER CREDIT 15.0

Advanced Placement		**Year**	**Credit**
English Literature & Compostn		*2016*	
Equivalent Credit transfer to Term Fall 2019 CU Colo Springs			
ENGL 1999TC	*Lower Div ENGL*		3.0
Economics: Macroeconomics		*2016*	
Equivalent Credit transfer to Term Fall 2019 CU Colo Springs			
ECON 2020	*Introduction to Macroeconomics*		3.0
English Language & Compositio		*2015*	
Equivalent Credit transfer to Term Fall 2019 CU Colo Springs			
ENGL 1310	*Rhetoric and Writing I*		3.0

COURSE TITLE	CRSE NR	UNITS	GRADE	PNTS
--------- Fall 2019 CU Colo Springs ------				
Coll of Business & Admin UGRD Business				
Business Law	BLAW 2000	3.0	A	12.00
ROAR Program I	BUAD 3100	1.0	P	0.00
Prod Apps for the Workplace	INFS 1100	3.0	A	12.00
Calc for Business & Economics	MATH 1120	3.0	C-	5.10
Business & Admin Writing	TCID 2080	3.0	A-	11.10
ATT 13.0 EARNED 13.0 GPAHRS 12.0 GPAPTS 40.20 GPA 3.350				
--------- Spring 2020 CU Colo Springs ------				
Coll of Business & Admin UGRD Business				
Pass/Fail grade option expanded due to COVID-19 global pandemic. See legend. .				
Intro Internship in Business Graded P or F only; No student option.	BUAD 2960	3.0	P	0.00
ROAR Program II Graded P or F only; No student option.	BUAD 3200	1.0	P	0.00
Global Literature I GT-AH2 - Arts & Hum: Lit & Humanities	ENGL 2600	3.0	A	12.00
Integrated Skills for Mgmt	MGMT 3000	3.0	A	12.00
Principles of Marketing	MKTG 3000	3.0	A	12.00
Marketing Research	MKTG 3300	3.0	A	12.00
Business Statistics	QUAN 2010	3.0	B	9.00
ATT 19.0 EARNED 19.0 GPAHRS 15.0 GPAPTS 57.00 GPA 3.800				
Deans List				
--------- Summer 2020 CU Colo Springs ------				
Coll of Business & Admin UGRD Business				
Basic Finance	FNCE 3050	3.0	A-	11.10
Envir Sys: Landforms and Soils	GES 1010	4.0	A	16.00
Intro to Mgmt & Organization	MGMT 3300	3.0	A	12.00
General Astronomy Laboratory I GT-SC1 - Natural & Physcal Sci:Lec Crse w/ Req Lab	PES 1090	1.0	A	4.00
Writing Portfolio Assessment Graded P or F only; No student option.	PORT 3000	0.0	P	0.00
Quan Analysis for Business	QUAN 2020	3.0	A-	11.10
ATT 14.0 EARNED 14.0 GPAHRS 14.0 GPAPTS 54.20 GPA 3.871				

UNOFFICIAL TRANSCRIPT

NAME: Jones, Victoria
STUDENT NR: XXX-XX-7854/109675194 BIRTHDATE : 12/01/XXXX
PRINT DATE: 12/15/2021

COURSE TITLE	CRSE NR	UNITS	GRADE	PNTS
--------- Fall 2020 CU Colo Springs ------				
Coll of Business & Admin UGRD Business				
ROAR Program III	BUAD 3300	1.0	P	0.00
Graded P or F only; No student option.				
Info Sys & Bus Intel Impact	INFS 3000	3.0	A	12.00
Service Mgt & Marketing	MKTG 4400	3.0	A	12.00
Promotion Mgmt & Strategy	MKTG 4650	3.0	B	9.00
Digital & Soc Media Marketing	MKTG 4700	3.0	C	6.00
Fund of Operations Mgt	OPTM 3000	3.0	A	12.00
ATT 16.0 EARNED 16.0 GPAHRS 15.0 GPAPTS 51.00 GPA 3.400				
--------- Spring 2021 CU Colo Springs ------				
Coll of Business & Admin UGRD Business				
Business, Government & Society	BGSO 4000	3.0	A	12.00
Personal Selling & Sales Mgmt	MKTG 3400	3.0	A	12.00
Marketing Planning/Strategies	MKTG 4800	3.0	A	12.00
Politics and the Law	PHIL 3200	3.0	A	12.00
Philosophy of Law	PHIL 4260	3.0	A	12.00
Strategic Management	STRT 4500	3.0	A	12.00
ATT 18.0 EARNED 18.0 GPAHRS 18.0 GPAPTS 72.00 GPA 4.000				
Presidents List				

CUMULATIVE CREDITS :

	TR UNITS	CU UNITS	TOT UNITS	QUAL UNITS	QUAL PTS	GPA
UGRD	40.0	80.0	120.0	74.0	274.40	3.708

***** END OF ACADEMIC RECORD ****

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Victoria Jones for a clerkship in your chambers. Victoria was one of the best students in my Criminal Law class during her first year of law school. Victoria received an A- in the Criminal Law course—quite an accomplishment in a class with a 3.2 grading mean. Every time I have called on her in either of my classes, Victoria has been incredibly well prepared. She had seemingly thought through all the material and each question that I might pose. Victoria also wrote an excellent exam in my Criminal Law class that was substantively thorough and clearly written and organized. She is particularly good at carefully analyzing each piece of a statute—a skill that I saw on display both in the classroom and in her final exam.

My Criminal Law course focuses heavily on statutory interpretation and analysis, so I feel comfortable saying that Victoria's ability to interpret a statute and work carefully through complex legal analysis exceeds that of most of the students I have taught in a decade of teaching. Unlike in most first-year courses, my Criminal Law students rarely read judicial opinions. They instead read extensive fact patterns and numerous statutes. We then spend most of our class time parsing statutes and determining whether the government could satisfy its burden of proof on every element of each statute. Victoria was always incredibly well prepared for class. When I called on her, it was clear that Victoria had already worked carefully and methodically through each of the statutes and had considered in detail how each of the specific facts might support or undermine potential charges. Her answers were succinct yet comprehensive.

Victoria did an excellent job on the final exam in my Criminal Law class. Among the many strengths of her exam, her careful parsing of the statutory text particularly stands out. Because I agree with the criticism that Justice Scalia levied about the first-year law school curriculum being too grounded in common law and not enough in statutes, I teach a course and give an exam that is deeply grounded in statutes. I provide numerous statutes that can apply to each question, and students must work through them in detail.

One particularly impressive piece of Victoria's statutory analysis arose on the homicide question where I gave students a felony murder rule statute that included examples of inherently dangerous felonies followed by a residual clause. Many students ignored the examples of those inherently dangerous felonies. By contrast, Victoria's answer deployed the ejusdem generis canon quite effectively. She recognized that theft and rape committed by force or threat of force both involve force or threat of force applied directly to someone's person. She then explained that transporting drugs—the charge at issue in the exam fact pattern—does not involve similar force or threat of force applied directly to someone's person. It thus could not be a predicate felony within the meaning of that statute. Few students handled that statutory provision well, which is why Victoria's clear analysis stood out so much. Nonetheless, I was not surprised to see Victoria handle those statutes so well. She was similarly careful and effective at breaking down statutes and applying the facts when I called on her in class.

The first question of my final exam last Fall involved a minor in possession of a short-barreled rifle, and it required a lot of careful work with the specific language of various statutes to reach that conclusion. Victoria had one of the very highest scores on that question. To begin with, she recognized that I had used statutory language that made the length of the firearm a strict liability element; she quoted that statutory language to prove that point in her response. My students had not seen many strict liability elements all semester, but Victoria handled the strict liability language easily and persuasively. The relevant statute also used two different types of measurements that could make a gun short barreled—the length from bolt face to muzzle or the total length. There too, Victoria handled that statutory structure with ease despite the time pressure. She recognized that the two methods for measuring the rifle were separated by an "or," and she even emphasized the word "or" in her exam answer.

In addition to the strong substance of Victoria's final exam, her answer was extremely easy to read and grade because it was very well organized and clearly written. Under the time pressure of an exam, many students do not deliver very clear or organized work product, especially in the Fall of their first year of law school. Victoria's exam used headings and subheadings throughout to clearly separate each issue that she addressed. She used paragraph structure very effectively, ensuring that each paragraph addressed only a single point. Within that very clear framework, Victoria's writing was itself quite straightforward, clear, and concise. She very effectively triaged the numerous issues on the exam—dedicating most of her time to the closest questions and resolving the easy ones sometimes as quickly as in a single clear sentence. In so doing, Victoria showed excellent judgment and ability to sift through numerous arguments—a skill that I found quite important when I was a law clerk.

Victoria cares about precision in language—a theme that runs through her success in my class, her interest in contract work and contract law, and her interest in numerous statutory and business law courses in the law school curriculum. Victoria's favorite class during her first year of law school was Contracts; she likes the idea that effective contract drafting requires writing clearly enough that even non-lawyers can understand and comply with the language. I was very excited to learn that Victoria spent part of last summer working in-house doing contract review and researching contract law issues because that work builds so wonderfully on her interests and her skills. I am excited about the careful attention to language and organization that Victoria will bring to a clerkship and to the practice of law.

Victoria has been and continues to be a wonderful member of our law school community and our surrounding community. She

Russell Gold - rgold@ua.edu - 205-348-1139

has been active in several student organizations, and she volunteers at a local animal shelter.

It was a pleasure to have Victoria Jones in my class, and I am delighted to have this opportunity to recommend her. She will make an excellent law clerk. Victoria is a clear analytical thinker and writer; she is also an extremely nice and engaging person who is a pleasure to talk with. If I can provide you with any additional information, please feel free to contact me at 205-348-1139 or rgold@law.ua.edu.

Very truly yours,

Russell M. Gold
Associate Professor of Law
University of Alabama School of Law

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am happy to recommend Victoria Jones for a judicial clerkship. Victoria was a strong student in my Civil Procedure class in the fall 2021 semester, when I taught at the University of Alabama School of Law. I am also impressed by Victoria's engagement with the Alabama Law community, as illustrated by her involvement with several organizations, such as the Journal of the Legal Profession and as the Secretary of If/When/How. I believe that Victoria will make a fine law clerk, and I highly recommend her.

Victoria's exam in Civil Procedure demonstrates her analytic ability. She did a terrific job with issues of personal jurisdiction and the plausibility pleading standard from Bell Atlantic Corp. v. Twombly (2007) and Ashcroft v. Iqbal (2009). Although Victoria did not perform as well on the exam as I might have expected (she earned a B+), I feel confident that she has a strong understanding of the law of jurisdiction and procedure.

Victoria further showed her legal skills and fascination with the law through her engagement in and outside of class. During the fall 2021 semester, law schools continued to deal with the effects of the COVID-19 pandemic, and students were required to wear masks much of the fall semester. But Victoria did a great job participating even in this complex environment. In class, I use a Socratic method of teaching; I call on students at random (an approach I continued to use in this new teaching environment). Victoria was consistently ready to answer questions. She was also a frequent participant during office hours. We had many terrific conversations—about topics ranging from the Erie doctrine and res judicata to more general questions about the Supreme Court's approach to statutory interpretation. Victoria was particularly curious about the Court's increasing interest in textualism. Her fascination with the law will undoubtedly make her a strong addition to any judicial chambers.

If I can be of any more assistance, please do not hesitate to contact me, either by phone (w: 512-232-1363; c: 703-786-9731) or email (tgrove@law.utexas.edu). I wish you the best of luck with your selection process.

Sincerely,

Tara Leigh Grove
Vinson & Elkins Chair in Law
University of Texas School of Law

VICTORIA JONES

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WRITING SAMPLE

The attached writing sample is the Seminar Paper I prepared for an Advanced Contracts Seminar in Spring of 2023. For my paper, I chose to conduct empirical research into mandatory arbitration, particularly its use in work contracts with low-wage employees. I was interested to see what people's understanding of arbitration was. This work has been reviewed by my seminar professor.

EMPLOYEE KNOWLEDGE OF ARBITRATION: AN EMPIRICAL ANALYSIS

Victoria Jones

Part I: Introduction

Modern contract law has come a long way from bartering in the town square over how many pieces of cheese your chicken was worth. Heated negotiations back and forth between two parties have largely been replaced in modern society by contracts of adhesion – that is, an agreement drafted by one party (or their legal team) and presented to the other on a take-it-or-leave-it basis.[1] Parties no longer negotiate terms or attempt to reach a common understanding about the contract. Rather, they usually check a box or click a button and become bound to a set of terms they almost certainly did not read.[2]

Currently, courts widely enforce contracts of adhesion, no matter how one-sided their terms appear to be.[3] They expect consumers and employees to have read the terms of any contract they signed or agreed to; if they cannot read, courts expect that the consumer or employee will have someone read the terms to them.[4] This is called the duty to read.[5] While contracts of adhesion have given rise to the duty to read, it has been argued that even if the average person did read the terms of the contracts, they would either not be able to understand the terms or they would not fully comprehend the consequences of certain provisions.[6]

Criticisms of the duty to read have abounded in legal scholarship, but this paper is concerned with a narrow issue regarding one specific and common provision within adhesive contracts: mandatory arbitration in employment contracts.

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[1] 1 Corbin on Contracts Desk Edition § 24.18 (2021).
[2] *Id.*
[3] *Id.*
[4] Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255 (2019).
[5] *Id.*
[6] *Id.*

Arbitration has become a preferred method of dispute resolution in the United States.[7] Proponents of arbitration claim it is faster, cheaper, and less cumbersome than traditional litigation.[8] They champion arbitration as the solution to a broken judicial system for people who may not otherwise have the ability to pursue meritorious claims.[9] In theory, there were many benefits to arbitration that would make it more accessible than litigation. It is true that litigation poses many barriers to average American people.[10] However, in practice, arbitration has made bringing claims even more challenging. Some of its perceived benefits cut against unsophisticated parties, such as low-wage employees. With the widespread use of adhesive contracts that often include arbitration provisions and the enthusiastic support of the courts in enforcing them, mandatory arbitration has become increasingly prevalent.

This paper will examine how much people actually know about the costs and benefits of arbitration. Specifically, I am interested to see if people understand what rights and privileges they are giving up when they consent to be subject to an arbitration provision. Going into the study, I hypothesized that even if people did read the terms they were subject to, they would not be aware of the effects arbitration has on the outcomes of cases.

Part II of this paper will examine a brief history of arbitration and discuss key statutes and cases that support its use and enforcement. This leads us to Part III, which explains the central issue of the paper: the disparity between the expected benefits of mandatory arbitration and the reality of how oppressive it is in practice. To research employee understanding of this issue, a survey was drafted on Qualtrics and distributed through Positly. The methodology used

[7] Katherine Stone & Alexander Colvin, *The Arbitration Epidemic*, ECONOMIC POLICY INSTITUTE, December 7, 2015, at 10.
[8] *Id.* at 3.
[9] *Id.*
[10] *Id.* at 3, 4.

and analysis of the results is discussed in Part IV. The survey was designed to test users' general knowledge of arbitration, their perceptions of the effects of arbitration, and understanding of their rights when they were subject to an arbitration clause.

Part II: Background

In order to understand how we arrived at broad use of arbitration and enforcement of mandatory arbitration agreements, it is important to observe how arbitration has developed in the United States and the role it plays in dispute resolution today. The federal statute governing arbitration agreements is the Federal Arbitration Act, which is discussed below. We will then look at two groundbreaking cases that drastically affected the use and enforcement of arbitration clauses in contracts of adhesion: *Concepcion* and *Epic Systems*.

A. The Federal Arbitration Act

Prior to 1925, courts generally disfavored arbitration as a means to settle disputes; it was sometimes recognized, but not preferred.[11] Arbitrators' authority was limited to specific issues, such as bankruptcy or admiralty law, and courts could (and did) freely choose not to bind parties to an agreement to arbitrate.[12] Due to mounting judicial hostility towards arbitration, Congress enacted the Federal Arbitration Act (FAA) in 1925.[13]

The FAA was designed to ensure that courts enforced arbitration agreements the same as other contracts. Congress required courts to respect and enforce agreements to arbitrate; it also specifically directed them to respect and enforce the parties' chosen arbitration procedures. Importantly, Congress directed courts to treat arbitration agreements as "valid, irrevocable, and

[11] Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008).
[12] DANIEL CENTNER AND MEGAN FORD, A BRIEF PRIMER ON THE HISTORY OF ARBITRATION, 2006.
[13] 9 U.S.C.S. § 2.

enforceable." This was meant to place arbitration agreements on the same footing as other contracts and ensure they were enforced against parties.

Over time, as the jurisprudence developed, it became clear that arbitrators had much more power than before. Federal courts were encouraged to interpret the FAA liberally, which resulted in arbitrators getting broad authority. For example, arbitrators could determine the validity of contracts at issue that had arbitration clauses. They could also determine whether a dispute fell within their jurisdiction to arbitrate in the first place. States did attempt to curb the reach of the FAA with their own legislation and courts, but these efforts were repeatedly struck down. Since laws that attempted to limit the scope of the FAA were held to be unenforceable, the use of arbitration became progressively more prevalent.

B. Concepcion:

Prior to the *Concepcion* case, state courts could refuse to enforce arbitration provisions if they felt that doing so was unconscionable.[14] In weighing a decision, courts could look to a number of factors, such as the bargaining power of the parties, the amount of individual versus aggregate claims, and whether the result of enforcing the arbitration agreement was overly harsh or one-sided.[15] If the court found that the overall result of the balancing test was that enforcing the arbitration agreement was unconscionable, it could simply refuse to hold the parties to the agreement and allow the claims to proceed in the judicial system.[16]

It is important to note that prior to *Concepcion*, this concept was the law in California (where the case originated). The state had enacted the Discover Bank Rule, which stated that class action waivers in consumer contracts of adhesion were unconscionable in cases where a

[14] Discover Bank v. Superior Court, 36 Cal. 4th 148, 153 (2005).
[15] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011).
[16] *Discover Bank*, 36 Cal. 4th at 153.

party with superior bargaining power was alleged to have cheated large numbers of consumers out of individually small sums of money.[17] The state of California also reserved the ability to refuse to enforce any arbitration agreement or class action waiver if the court found that public policy weighed against upholding the agreement.[18] In fact, the FAA was subject to similar unconscionability standards in other states.[19]

The lower courts ruled in favor of the plaintiffs.[20] They found that the FAA did not preempt the Discover Bank Rule because all contracts were subject to review for unconscionability; the rule was merely a refinement of this standard, so arbitration agreements were treated the same way as other contracts.[21] Importantly, the FAA itself has a savings clause that states arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[22] Many state courts believed (and federal appellate courts agreed) that the savings clause allowed the FAA and state unconscionability doctrines to coexist without preemption issues.[23]

However, the Supreme Court disagreed with this interpretation. In a decision written by Justice Scalia, the Court said the FAA had clear and simple objectives; to ensure that agreements to arbitrate were respected and enforced by the courts.[24] The savings clause, Justice Scalia wrote, did not attempt to preserve states' rights to interfere with these objectives.[25] In overruling the decision of the California state courts, the Supreme Court essentially held that the FAA superseded state laws that would allow arbitration clauses to be avoided by parties if they were

[17] *Id.* at 156.
[18] *Id.*
[19] *See* 42 Pa.C.S. § 7303.
[20] *Concepcion*, 563 U.S. at 338.
[21] Laster v. AT&T Mobility LLC, 584 F.3d 849, 854 (2009).
[22] 9 U.S.C.S. § 2.
[23] *Concepcion*, 563 U.S. at 338.
[24] *Id.* at 344.
[25] *Id.*

unconscionable. The FAA's strong policy in favor of arbitration outweighed the state's interest in protecting consumers from unfair arbitration clauses.

After this case, states were no longer allowed to refuse to enforce arbitration agreements, no matter how unconscionable the agreements were. This has made it much more difficult for consumers to bring class action lawsuits against businesses. While the *Concepcion* case was controversial when it was decided, it has had a significant impact on the law surrounding arbitration. It is a clear example of the Supreme Court's commitment to enforcing the FAA's strong policy in favor of arbitration.

C. Epic Systems:

In the *Epic Systems* case, the court considered the issue of whether the National Labor Relations Act (NLRA) prevented arbitration agreements from precluding class actions in employment cases.[26] The NLRA protects workers' rights to engage in collective action, including the right to unionize and the right to engage in concerted activity for mutual aid or protection.[27] In this case, three employees attempted to sue their employers in class actions after their employers denied them overtime wages. All three employers had required their employees, including the plaintiffs, to sign arbitration agreements that required them to individually arbitrate any claims against the employer; class actions were prohibited.[28] In court, the plaintiffs argued that the NLRA prohibited class action waivers, so the contracts were not enforceable.[29]

However, the court disagreed. It held that if employees signed an arbitration agreement with an employer, they were required to submit claims to arbitration and could not sue in

[26] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018).
[27] 29 U.S.C.S. § 151.
[28] *Epic Systems*, 138 S. Ct. at 1619, 1620.
[29] *Id.* at 1620.

courts.[30] The arbitration agreements would be upheld even if the employer required the employee to sign the agreement as part of their employment, as the plaintiffs in *Epic Systems* had. The Court thus held that arbitration agreements between employers and employees that require claims to be brought on an individual basis do not violate the NLRA because the NLRA does not specifically mention class actions or express disapproval of arbitration as a dispute resolution method for employment cases.[31] The Court further held that the FAA requires courts to enforce such agreements as they are written. Thus, litigants in federal court were similarly left with no way to get out of an arbitration agreement. This case also extended the reach of mandatory arbitration to employees, not just consumers.

The impact of this case on workers' rights has been significant. It has made it more difficult for workers to hold their employers accountable for wage and hour violations, discrimination, and other workplace violations. It has also made it more difficult for workers to join together to negotiate better working conditions, wages, and benefits. The decision has also led to criticism that it favors employers over employees and may lead to a reduction in workers' bargaining power. The *Epic Systems* opinion itself, authored by Justice Gorsuch, alludes to the controversy: "The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written… Because we can easily read Congress's statutes to work in harmony, that is where our duty lies."[32]

The outcomes of the *Concepcion* and *Epic Systems* cases, taken together, have serious implications for both employees and consumers. Such plaintiffs attempting to bring suit against either a company or their employer no longer have a legal remedy in either state or federal court

[30] *Id.* at 1622.
[31] *Id.*
[32] *Id.* at 1632.

if they sign an arbitration agreement or a contract containing an arbitration clause. When read against the backdrop of adhesion contracts and the duty to read, no arbitration clause will be overturned by courts. Thus, its practice and use by large companies has increased exponentially.

Part III: The Issue

Perhaps mandatory arbitration could be tolerated if it delivered on its promise to make legal remedies more available to people who lack access to the judicial system. However, many empirical studies have demonstrated that this is not the case.

A. Problems With Arbitration:

Over time, with the more widespread use of arbitration as a means of resolving disputes, a few major problems have emerged.

One issue arising from arbitration is the closed record. Arbitration proceedings are entirely private, meaning the facts and witnesses the arbitrator considered in making their decision are not disclosed to the public. When arbitration first came to forefront of American dispute resolution, this was seen as one of its strengths. Now, it is more commonly viewed as a flaw. Because arbitration disputes are settled off the public record, arbitrators do not have established precedent to ensure consistent outcomes. It also allows employers and businesses to keep claims against them from being made public.

Further, most (if not all) arbitration agreements preclude class actions.[33] This means that plaintiffs with individually small claims cannot aggregate their claims into a collective action against a common defendant. Without class actions as a remedy, many consumers and employees with individually small claims would find bringing any action inefficient. The average wage theft

[33] Katherine Stone & Alexander Colvin, *The Arbitration Epidemic*, ECONOMIC POLICY INSTITUTE, December 7, 2015, at 11.

claim is $1,393.[34] This is almost a month's pay for the average retail cashier or housekeeper[35]; yet, it is significantly lower than the costs of arbitrating a claim, which can reach tens of thousands of dollars from start to finish.[36] Thus, while employees could bring claims in theory, a simple cost benefit analysis would likely discourage them from pursuing a claim, even if they felt it had merit.

The repeat player problem has also emerged as a growing issue in arbitration. This refers to an employer's ability to choose the arbitrator who will hear any claims brought against them. As a result of the desire to generate repeat business with the employer, the arbitrator will increasingly rule in favor of the employer and against the employee. One study shows that the first time an employer appeared before an arbitrator, the employee had a 17.9% chance of winning, but after the employer had four cases before the same arbitrator the employee's chance of winning dropped to 15.3 percent, and after 25 cases before the same arbitrator the employee's chance of winning dropped to only 4.5 percent.[37]

B. Arbitration versus Litigation:

First, while arbitration has been hailed as a low cost alternative to litigation, it may not be cost effective at all. In fact, arbitration usually carries far more required fees than state and federal courts. This means the overall costs associated with arbitrating claims are much higher than court fees. An initial filing fee in state small claims court ranges from $30-200[38]. Federal

[34] U.S. Department of Labor, Wage and Hour Division, *Data & Statistics*, https://www.dol.gov/agencies/whd/data#:~:text=WHD%20investigations%20in%20fiscal%20year,for%20three%20weeks%20of%20work (last visited Apr. 29, 2023).
[35] *Id.*
[36] Mark Fotohabadi, *How Much Does Arbitration Cost*, June 10, 2022, https://www.adrtimes.com/how-much-does-arbitration-cost/.
[37] Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*.
[38] STATE OF ALABAMA UNIFIED JUDICIAL SYSTEM: FEE DISTRIBUTION CHART (2015); *see also* NC JUDICIAL BRANCH: SMALL CLAIMS, https://www.nccourts.gov/help-topics/lawsuits-and-small-claims/small-claims (last visited April 29, 2023).

court filing fees are $350.[39] Courts have no other mandatory costs or fees, though the parties may incur costs related to litigating a case, such as travel and hiring legal counsel. In arbitration, initial filing fees are as low as $1,000 and can be as high as $4,300.[40] Parties in arbitration also pay additional fees for discovery and a hearing, which are usually in the hundreds of dollars, as well as ongoing administrative fees and the arbitrator's hourly fee, which can be as high as $375 an hour.[41] Some plaintiffs were also required to pay a $2,750 fee per day to have a hearing.[42] Additionally, most arbitration agreements contain fee-shifting provisions that may require the employee to cover certain costs or split them in half. Some fee-shifting provisions may impose all the costs of arbitration on the losing party (which is often the employee).

Damages awards in litigation are exponentially higher than those awarded employees in arbitration. A recent study shows a median of $36,500 in damages is awarded under arbitration, compared to $176,000 in federal courts and $86,000 in state courts.[43] Another study with a different arbitration servicer suggests an even higher disparity: The average (mean) amount of damages awarded to plaintiffs in employment cases is $23,548 in mandatory arbitration, $143,497 in federal court, and $328,008 in state court.[44]

Further, employees are far less likely to win in arbitration than they are in litigation. Employee win rates in mandatory arbitration win only about 21.4 percent of the time, 59 percent of the time in the federal courts, and 38 percent of the time in state courts.[45] As a result of the

[39] UNITED STATES COURTS: U.S. COURT OF FEDERAL CLAIMS FEE SCHEDULE (2020).
[40] Lucey v. FedEx Ground Package Sys., U.S. Dist. LEXIS 77454, at 6 (2007).
[41] *Id.*
[42] *Id.*
[43] Christopher Ingraham, *There's a little-known employment contract provision enabling billions of dollars in wage theft each year*, https://www.washingtonpost.com/business/2020/02/13/theres-little-known-employment-contract-provision-enabling-billions-dollars-wage-theft-each-year/, last accessed March 1 2023.
[44] Katherine Stone & Alexander Colvin, *The Arbitration Epidemic*, ECONOMIC POLICY INSTITUTE, December 7, 2015, at 20.
[45] *Id.*

low likelihood of success, over 98% of workers will abandon a claim against an employer rather than attempt to arbitrate the issue against them.[46] Only 2% of workers will actually proceed with a claim after they find out they are subject to an arbitration agreement.[47] This means that employers who violate the law are not held accountable to their employees or to society; they most often evade liability as well as any other significant consequences.

C. Effects on Worker's Rights

The increased costs of arbitration have not gone unnoticed by legal scholars, workers' rights groups, or consumer advocates. States are enacting laws to curb wage theft violations that could allow workers to bring suit on behalf of the state[48]. Recently, the US Department of Labor has also sought to prosecute claims for workers who are subject to mandatory arbitration to ensure the law is sufficiently enforced against employers engaging in illegal practices.[49]

However, little recourse outside arbitration is available for workers themselves. It is estimated that 65% of low wage employees (those making $13 or less an hour) are subject to mandatory arbitration clauses as well as 56% of all non-union private sector employees.[50] Overall, mandatory arbitration is estimated to affect over 60 million workers in the United States.[51] Should these workers become victims of wage theft, discrimination, or harassment, they would have no legal recourse besides arbitration, where they face almost certain defeat.

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[46] Christopher Ingraham, *There's a little-known employment contract provision enabling billions of dollars in wage theft each year*, https://www.washingtonpost.com/business/2020/02/13/theres-little-known-employment-contract-provision-enabling-billions-dollars-wage-theft-each-year/ (last visited April 29, 2023).
[47] *Id*.
[48] Chris Marr, *Wage Violations Targeted in Latest State Legislative Proposals*, BLOOMBERG LAW, June 28, 2022, https://news.bloomberglaw.com/daily-labor-report/wage-violations-targeted-in-latest-state-legislative-proposals.
[49] U.S. Dep't of Labor, *Mandatory Arbitration Won't Stop Us from Enforcing the Law*, (Mar. 20, 2023, 2:43 PM), https://blog.dol.gov/2023/03/20/mandatory-arbitration-wont-stop-us-from-enforcing-the-law#:~:text=And%20because%20many%20mandatory%20arbitration,now%20subject%20to%20mandatory%20arbitration.
[50] *Id*.
[51] *Id*.

It is estimated that wage theft costs US employees over $15 billion a year[52]. Most of this money will never be recovered and provided to the employees who earned it because the costs of bringing a claim outweighs the amount of the money they lost.

Further, there is evidence that the number of forced arbitration for both consumers and employees increased during the COVID-19 pandemic.[53] As the number of arbitrations went up, the employee win rates went down to only 5.3%.[54] From 2019 to 2020 alone, the number of forced arbitrations increased 17%.[55] While 60 million employees are currently subject to mandatory arbitration agreements, only 82 employees won cases in 2020.[56] Top corporate defendants in mandatory arbitration claims include Family Dollar, Chipotle, and Macy's.[57] While some companies have started to move away from mandatory arbitration agreements, other companies (including Tesla) embrace the practice now more than ever.[58]

Thus, we can see that the practice of mandatory arbitration in the workplace is stronger than ever and has grown in strength and scope since *Concepcion* and *Epic Systems*.

Part IV: Empirical Analysis

Traditionally, for contract terms to be enforceable, the parties should reach a "meeting of the minds," or generally know and understand what the terms of the contract are.[59] This school of doctrine has essentially been replaced by the duty to read, as courts hold that even a small indication of consent is sufficient to bind the parties.[60] However, I believe that even if people did

[52]Katie Lester, *Forced Arbitration Robs Workers Billions in Wages*, CENTER FOR PROGRESSIVE REFORM BLOG, February 4, 2021, https://progressivereform.org/cpr-blog/forced-arbitration-robs-workers-billions-wages/.
[53] American Association for Justice, *Forced Arbitration in a Pandemic: Corporations Double Down*, Oct 27, 2021, https://www.justice.org/resources/research/forced-arbitration-in-a-pandemic.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. Rev. 2255 (2019).
[60] *Id.*

read the terms of adhesion contracts, they would probably be unaware of the legal consequences of certain provisions. While arbitration clauses can have drastic effects on one's legal rights post-*Concepcion* and *Epic Systems*, I suspected that most people were unaware of these effects, such as lower damages awards, decreased chances of winning, and higher required costs and fees.

This finding could be significant because it undermines the meaning of the duty to read; while the duty to read assumes that people are able and willing to read contractual terms, simply reading them would be pointless if one does not understand the legal effects of what they are agreeing to. The duty to read has been used as a proxy for consent; but how could one consent to terms they lack fundamental knowledge of. Alternatively, if people do understand what agreeing to arbitration means for their potential claims, it could indicate that perhaps arbitration is a smaller issue than scholars make it out to be. If people walk into arbitration agreements with full knowledge of it, they have knowingly and understandingly consented to be bound. While terms such as arbitration may be unfavorable to employees, they do have the right to enter into whatever contracts they choose.

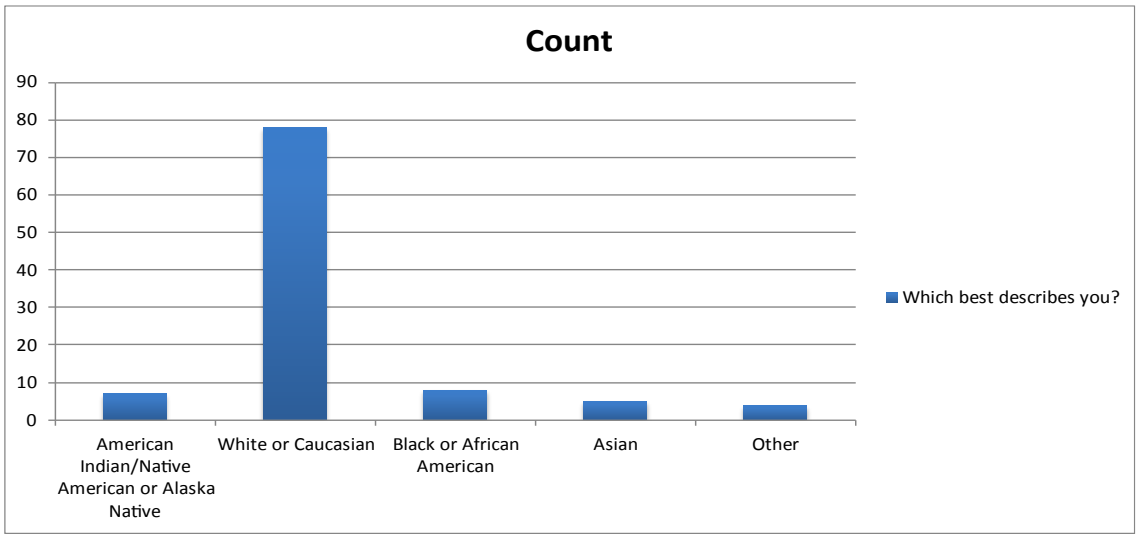
A. Methodology:

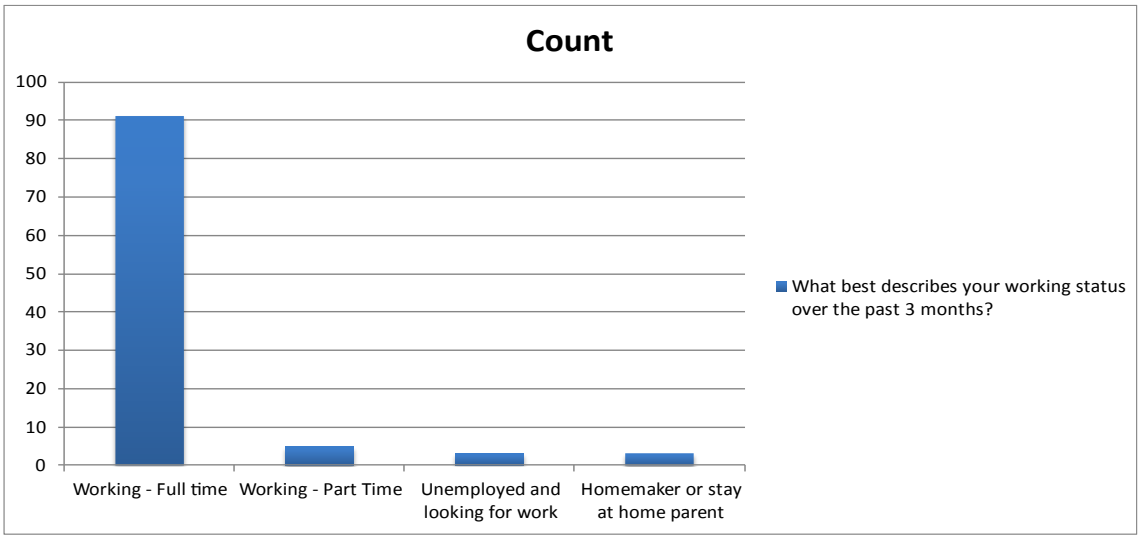
The purpose of the study was to determine if people understood the consequences of arbitration clauses and how such provisions affected their rights. There were two possible outcomes: one possibility was that people knew what agreeing to arbitration provisions meant, and they willingly accept these consequences when they signed contracts containing these clauses; the other possibility was that people did not fully understand the implications of agreeing to arbitration and thus enter into such agreements without knowing the consequences of doing so.

To conduct the research, I first wrote survey questions on Qualtrics. The survey had key questions about arbitration itself as well as questions where the respondents compared arbitration directly to litigation. The survey was then published on Positly. From Positly, people who agreed to participate in the study were rerouted to the Qualtrics page, where they completed the survey. Qualtrics collected all the answers and organized the data into reportable results.

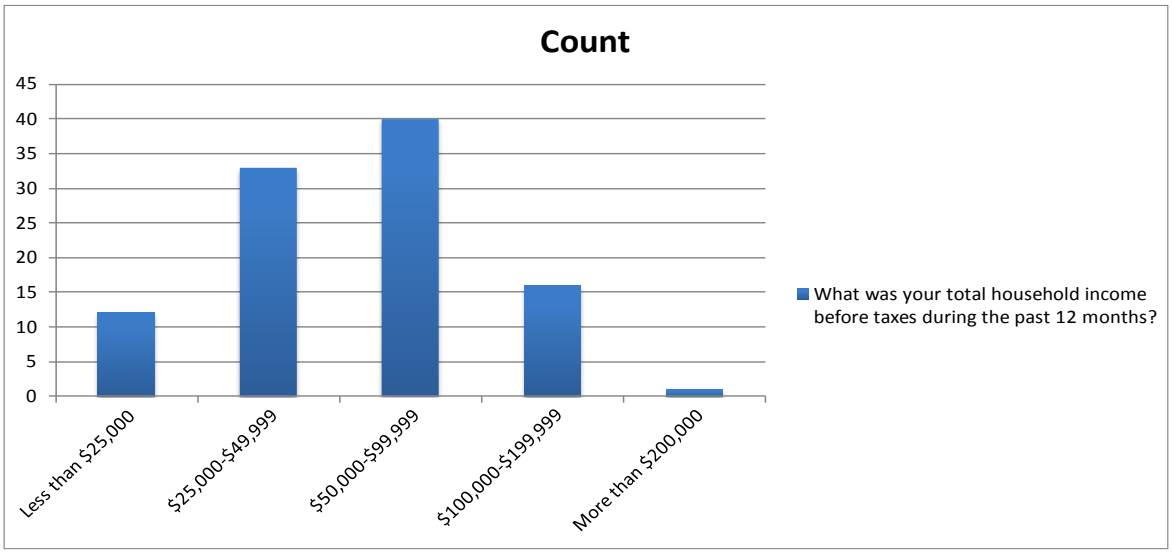
B. Results:

We recruited a total of 89 respondents to respond to the survey. While this is a small sample size, the findings demonstrate important issues regarding employees' understanding of arbitration. In terms of demographics, many survey respondents (53%) had a bachelor's degree or above. 89% of the respondents were working full-time. The respondents were skewed Caucasian (76.5%, compared with the 57% national average). Additionally, the respondents were 57.8% male and 42.2% female.

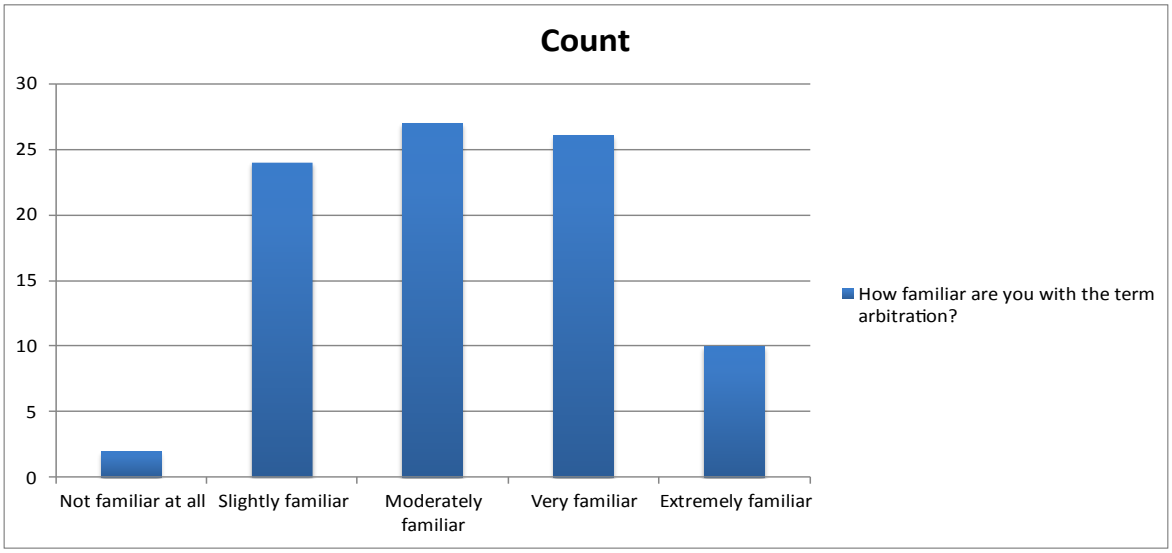




Additionally, the respondents mostly had average or below average income, with 83.4% reporting income under $100,000. Mandatory arbitration affects millions of workers who largely lack the resources to challenge their employment contracts or raise a claim against an employer in arbitration. It is also very likely that our respondents are either currently subject to arbitration agreements under their current employers or have been subject to mandatory arbitration in the past. The responses they provided are therefore very valuable; we had the opportunity to learn from employees affected by arbitration agreements themselves.



We asked the respondents how familiar they were with the term arbitration. We also asked the respondents to describe what they thought arbitration was in their own words. For the most part, the respondents seemed confident in their own knowledge of arbitration, with most of them (97.8%) indicating some level of familiarity with the term.



Answers to the free-response questions indicate the respondents also seemed to generally understand what arbitration was. For example, one respondent wrote: "Arbitration resolves disputes outside the judiciary courts." Another wrote: "Using a 3rd party to settle a dispute." Another replied: "Settling a dispute by an independent third party." While these are only a few examples, the responses taken as a whole showed that in general, people are aware of the fundamentals function of arbitration. The descriptions are also neutral; no one indicated a strong preference either for or against arbitration.

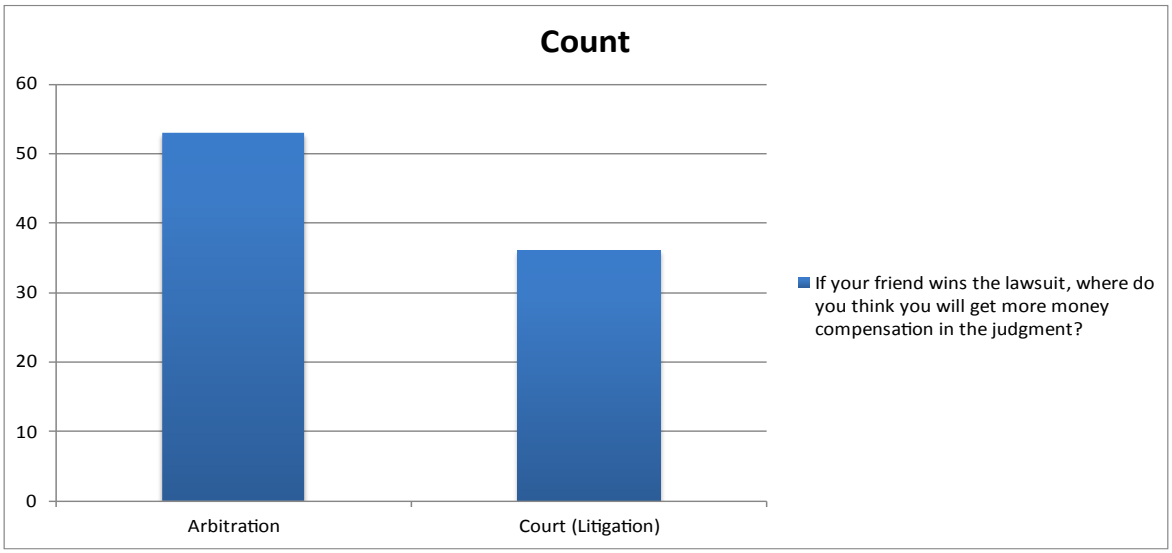
However, in another free response question, when presented with an arbitration clause and asked to explain what it meant, the respondents fell short of accuracy. This means they may lack a basic knowledge of what the language was conveying. The arbitration provision read:

"Any controversy or claim arising out of or relating to this Agreement or the parties' dealings shall be settled by arbitration in the City of New York, NY, in accordance with the then-governing rules of the American Arbitration Association. If such organization ceases to exist, the arbitration shall be conducted by its successor, or by a similar arbitration organization, at the time a demand for arbitration is made. The decision of the arbitrator shall be final and binding on both parties. Judgment upon the award rendered may be entered and enforced in any court of competent jurisdiction."

One respondent said: "If you have an issue, you need to engage in arbitration with the company or it's [sic] successor in NYC to come to a binding outcome." Another wrote: "If a disagreement happens between the two parties then the issue will be settled outside of court (arbitration) by the arbitration organization listed." However, many respondents wrote "n/a" or

"nothing," suggesting they either could not read or did not understand the arbitration provision. It could also mean they didn't read the provision closely enough to extract its meaning.

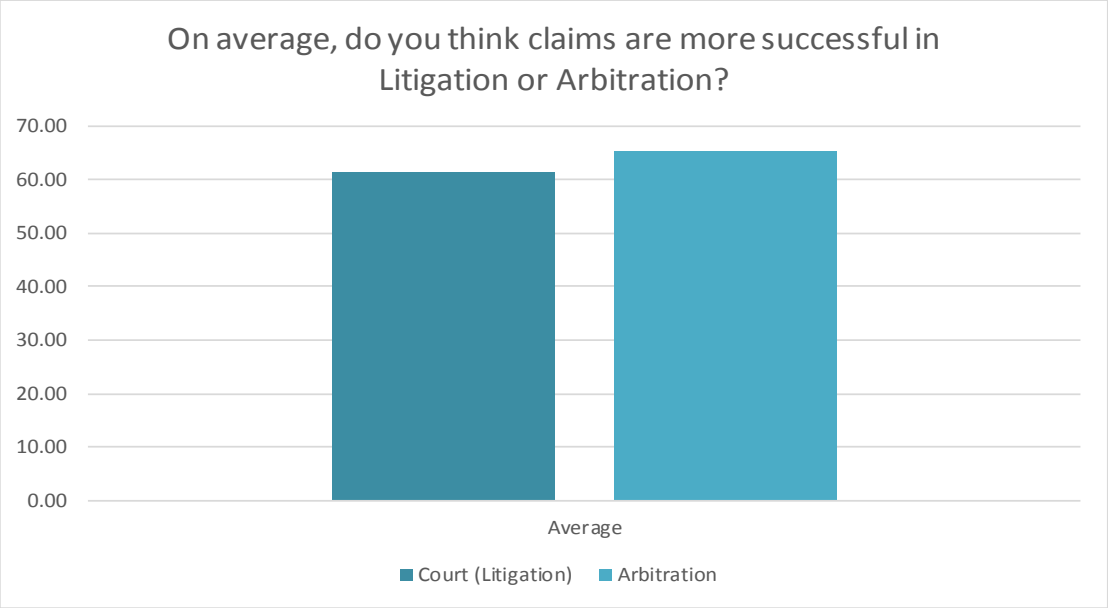
Further, when asked specific questions about arbitration, the respondents seemed to collectively stumble. First, the respondents believed that arbitration would result in higher money damages being awarded to a successful claim. They were presented with a hypothetical situation regarding a friend who is subject to an arbitration agreement, and then asked where they believed the friend would win the most money.



The respondents also thought claims fared slightly better in arbitration than in traditional litigation. On average, the respondents believed court cases were successful for plaintiffs in wage theft claims 61% of the time in litigation and 65% of the time in arbitration. This can be compared to actual win rates: plaintiffs succeed in wage theft claims in federal court 59% of the time[61] and only 5.3% of the time in arbitration.[62] While the respondents were fairly accurate in

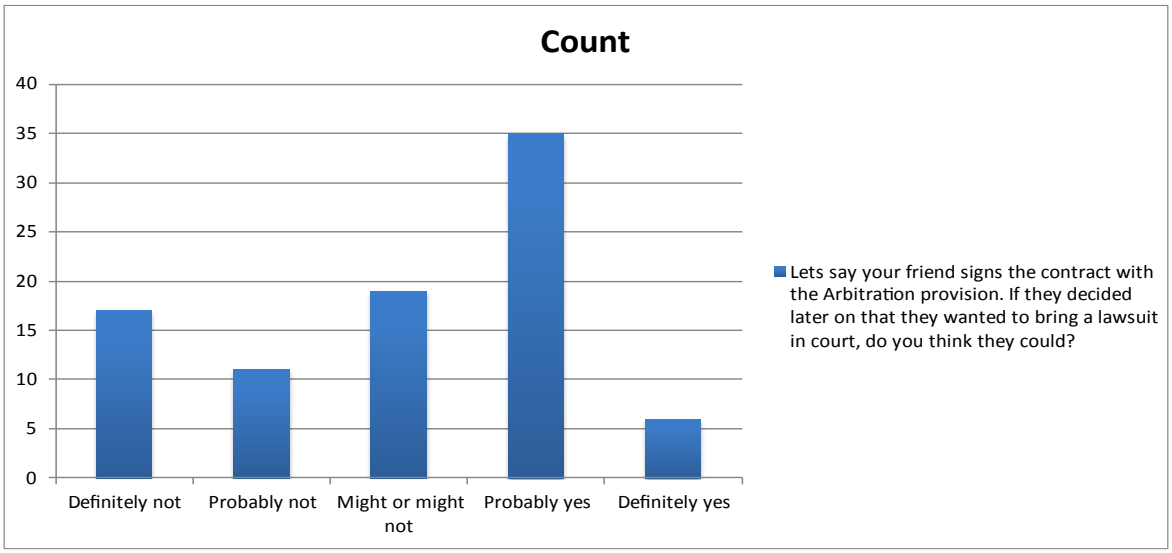
[61] Katherine Stone & Alexander Colvin, *The Arbitration Epidemic*, ECONOMIC POLICY INSTITUTE, December 7, 2015, at 20.
[62] American Association for Justice, *Forced Arbitration in a Pandemic: Corporations Double Down*, Oct 27, 2021, https://www.justice.org/resources/research/forced-arbitration-in-a-pandemic.

predicting their likelihood of success in litigation, they drastically missed the mark on arbitration. Perhaps more importantly, they believed as a whole that their chances were better in arbitration, while this has been shown to not be the case.



One of the more surprising results was that the respondents did not seem to realize that arbitration clauses foreclosed the possibility of bringing a lawsuit in court. When asked if they believed whether or not they could bring a lawsuit in court while subject to an arbitration agreement, most of the respondents indicated they thought they could, with the most common answer being "probably yes." As we have observed from the case law, this is inaccurate. The Supreme Court has held that the FAA mandates arbitration if the parties agreed to it.[63] This was a rather troubling discovery, as it is completely incorrect given current precedent.

[63] *Epic Systems*, 138 S. Ct. at 1632.



C. Analysis

The study shows that most people have significant misconceptions about the costs and benefits of arbitration as an alternative dispute resolution method. While this was a smaller study, and the findings are not technically statistically significant, they do raise several red flags. They support the second possibility identified earlier: that people don't fully understand the implications of agreeing to arbitration and thus enter into such agreements without knowing the consequences. As a whole, the results demonstrate that people's beliefs about the consequences of arbitration clauses are out of line with reality.

Overall, the respondents seemed to think that arbitration was generally more employee-friendly than traditional litigation. This stands in stark contrast with the common criticism of arbitration being exceedingly corporate-friendly. The respondents as a group were incorrect about the required costs of arbitration relative to litigation, how likely plaintiffs are to win claims, and the amount of damages they could expect to recover if they brought a successful claim for wage theft. Perhaps most importantly, they did not believe that an arbitration clause

precluded them from bringing a lawsuit in court. The expectation of litigation being an available remedy even with the presence of an arbitration provision speaks volumes. This shows a deep misunderstanding of the goals of arbitration provisions and the policies promulgated by the FAA (and supported by the Supreme Court) itself.

I think the results show a disconnect between what people think about arbitration and what arbitration does in practice. They indicate that people are not nearly as wary of arbitration as they should be. As long as these perceptions continue, large companies can continue to use this dispute resolution method to avoid accountability for violating the law while people remain oblivious – that is, until or unless they are faced with bringing a claim.

I would argue that this lack of basic understanding of arbitration weighs strongly in favor of returning to an unconscionability standard for arbitration agreements, or at least subjecting them to some level of judicial scrutiny. This issue goes beyond the duty to read. While the duty to read requires several assumptions about one's ability and willingness to read the terms of a contract, the results from this study suggest that reading the contract would do little to no good. The respondents here were confident in their understanding of arbitration, yet they were mistaken about the real implications of such an agreement. Had they been presented with the arbitration provision in the survey, they would have readily agreed to the terms with the full belief that they were likely better off pursuing claims in arbitration and not in court. This raises the issue of whether the parties have truly consented to be bound by such unfavorable terms, or whether they rather just didn't have the bargaining power to dispute the terms at the outset of the contract formation. This is exactly what the Discover Bank rule sought to prevent.[64]

[64] *Discover Bank*, 36 Cal. 4th at 153.

Also, the Court in Epic Systems said that Congress was free to amend the NLRA at any time to preclude class action waivers.[65] In light of the increased amount of wage theft that has occurred in the years since *Epic Systems*, I think the legislature should amend the statute accordingly. Individual claims are unlikely to succeed and are not cost effective; employees need the remedy of collective action if they are to successfully hold their employers accountable for breaking the law.

This survey strongly indicates that parties who agree to be bound by arbitration agreements have several key misconceptions about arbitration. While the courts have declined to offer judicial remedies, I would recommend as a matter of policy that companies begin to settle claims outside of arbitration, at least for small claims (i.e. anything less than $10,000). Some companies have bowed to social pressure regarding harassment claims, and others have moved away from forced arbitration entirely.[66] If the country is going to try to meaningfully combat wage theft, employees themselves need to be empowered to seek legal action themselves in small claims court. Small claims are governed by states and generally require low filing fees.[67] Claims are also typically straightforward enough to not require hiring legal counsel.[68]

Further, while states have traditionally been prevented from countering the FAA, I think their own legislation for combating wage theft should be honored if any come to fruition. Should states themselves take action against corporations, corporate defendants would be less able to avoid liability. Some examples of proposed state remedies include allowing employees to sue

[65] *Epic Systems*, 138 S. Ct. at 1630.
[66] American Association for Justice, *Forced Arbitration in a Pandemic: Corporations Double Down*, Oct 27, 2021, https://www.justice.org/resources/research/forced-arbitration-in-a-pandemic.
[67] NC JUDICIAL BRANCH: SMALL CLAIMS, https://www.nccourts.gov/help-topics/lawsuits-and-small-claims/small-claims (last visited April 29, 2023).
[68] *Id.*

employers on behalf of the state and empowering state labor boards to pursue prosecution and increased damages for companies that violate wage theft laws.[69]

Part V: Conclusion

While the court has held that the law regarding mandatory arbitration is clear, they conceded that the policy debate was far from over.[70] Moving forward, this research should help inform policy decisions that could enable smaller parties to hold their employers accountable for wage theft violations. Not only is there a massive problem concerning wage theft that affects thousands of workers a year, there are inadequate judicial remedies to help employees enforce their rights. The research conducted here shows that employees lack the knowledge to contest arbitration provisions themselves; they lack basic knowledge of the consequences of agreements to arbitrate claims. Situations such as this call for legal action, either from courts or legislators. In the future, courts must support any effort to combat the wage theft issue.

[69] Chris Marr, *Wage Violations Targeted in Latest State Legislative Proposals*, BLOOMBERG LAW, June 28, 2022, https://news.bloomberglaw.com/daily-labor-report/wage-violations-targeted-in-latest-state-legislative-proposals.
[70] *Epic Systems*, 138 S. Ct. at 1632.

Applicant Details

First Name	**Brianna**
Last Name	**Jordan**
Citizenship Status	**U. S. Citizen**
Email Address	**bjordan@bu.edu**
Address	**Address** **Street** **357 Faneuil St., Apt. 12A** **City** **Brighton** **State/Territory** **Massachusetts** **Zip** **02135** **Country** **United States**
Contact Phone Number	**630-631-6266**

Applicant Education

BA/BS From	**University of Illinois-Urbana-Champaign**
Date of BA/BS	**May 2021**
JD/LLB From	**Boston University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=12202&yr=2009**
Date of JD/LLB	**May 20, 2024**
Class Rank	**Not yet ranked**
Law Review/ Journal	**Yes**
Journal(s)	**Journal of Science and Technology Law**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Esdaile Moot Court Program**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Gonzales Rose, Jasmine
jgrose@bu.edu
617-358-6187
Feingold, Jonathan
jfeingol@bu.edu
617-353-5793
D'Amato, Laura
ledamato@bu.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Brianna Jordan
bjordan@bu.edu • 630-631-6266
357 Faneuil St., Apt. 12A, Brighton, MA 02135

June 11, 2023

The Honorable Jamar Walker
U.S. District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a rising third-year student at Boston University School of Law, and I am thrilled to be applying for a clerkship in your chambers for the 2024-2025 term. As a person who also values identifying how race and the law intersect, I am very excited to apply for this opportunity. Specifically, your involvement in the Committee on Race, Policing, and Prosecution is inspiring and points directly to my interests as a black woman entering the legal field. Additionally, I am particularly interested in engaging with federal law because thinking critically about federal issues while considering the particular facts of a case intrigues me.

My academic and professional pursuits have provided me the skills necessary to make a valuable contribution to your chambers. I developed my unique research and analytical skills through my work as a Lawyering Fellow for Boston University School of Law's Lawyering Course. Having taken this class as a first-year student, this position not only refined my research and writing skills, but also developed my leadership abilities as I helped guide first-year students. Additionally, I expanded these skills through my involvement in the Journal of Science and Technology Law and as a Research Assistant for Professor Jasmine Gonzales Rose. These positions helped me connect with a variety of areas of law, as well as formulate solutions to areas of law that affect many people. I have been able to further develop my leadership skills through my positions at Goodwin Procter's Boston office, and will continue as the Editor-in-Chief of the Journal of Science and Technology Law in the fall.

I believe that I could meaningfully contribute to your chambers next fall and look forward to the prospect of putting my research, writing, and communication skills to use. I would greatly appreciate the opportunity to interview with you. Thank you for your time and consideration.

Sincerely,
Brianna Jordan

Brianna Jordan

357 Faneuil Street, Apartment 12A, Brighton, MA 02135 • bjordan8120@gmail.com • 630.631.6266

EDUCATION

Boston University School of Law — **Boston, MA**
J.D. Candidate — Expected: May 2024
GPA: 3.56
Honor: *Journal of Science and Technology Law*, Editor-In-Chief (2023-2024); *Access to Justice Clinic*
Activities: Research Assistant for Professor Jasmine Gonzales Rose; Lawyering Fellow; Secretary for the Women of Color Collaborative

University of Illinois at Urbana-Champaign, Gies College of Business — **Champaign, IL**
Major: B.S. Supply Chain Management and Marketing with Highest Honors / Minor: Criminology, Law, and Society — May 2021
GPA: 3.9
Honors/Awards: 2021 Poets & Quants Best and Brightest Undergraduate Business Majors, Campus Honors Program (Chancellor's Scholar), Dean's List, Gies Scholars Program (1 of 36 students chosen from the top 1% of students admitted into the Gies College of Business) (L.S. Hall Scholarship), James Scholar, President's Award Scholarship
Activities: Co-Senior Board Head, Philanthropy Chair, Family Chair of Phi Chi Theta; Business Manager of No Comment A Cappella

PROFESSIONAL EXPERIENCE

United States Court of Appeals for the First Circuit — **Boston, MA**
Fall 2022 Intern — September 2022 – December 2022
- Drafted bench memos by efficiently and effectively reviewing the trial court opinion, appellate briefs, and applicable case law
- Cite checked draft opinions from other Judges on the Court to ensure grammatical, formatting, and content accuracy
- Conducted research on questions of law and fact for an upcoming opinion

Goodwin Procter LLP — **Boston, MA**
2L Diversity Fellow — May 2023 – July 2023
1L Diversity Fellow — May 2022 – July 2022
SEO Law Fellow — May 2021 – July 2021
- Compiled publications and testifying history in preparation for a deposition of an expert witness on a patent case
- Updated a chapter of a treatise on joint venture law in federal court by analyzing negative treatment on cases in the current chapter and identifying relevant new cases since the last update
- Conducted research on relevant case law for motions to dismiss in the employment and financial services practices
- Researched and drafted an educational blog post sent to clients on updated trends in the regulation of self-driving cars in the U.S.

Aetna, a CVS Health Company — **Chicago, IL**
GMCIP, LMO North Central Territory Intern — June 2020 – August 2020
- Analyzed April 2020 raw financial data from Aetna's five joint ventures to create a monthly membership report highlighting areas of growth and improvement on an aggregate level
- Created a Sales Management Dashboard for the Minnesota market by combining data from Excel and Salesforce to improve communication of the effectiveness of three sales leaders to their respective managers
- Collaborated with a fellow intern to implement a uniform onboarding process across the North Central Territory
- Designed a new operating model to accommodate organizational changes within the North Central Territory after gauging feedback from territory leaders and identifying areas of improvement in the meeting schedule

Supply Chain Management Program, Gies College of Business — **Champaign, IL**
Supply Chain Management Student Advisor — August 2020 – May 2021
- Assisted faculty and staff with planning and facilitating six events surrounding various areas of supply chain management and professional opportunities for students with corporate affiliate companies
- Hosted office hours for four hours each week to answer program-specific questions, give advice, and formulate four-year plans

Business 101: Professional Responsibility and Business — **Champaign, IL**
Section Leader — August 2018 – December 2020
- Led discussions and class activities to a group of 15-20 freshman students in a course that focuses on decision-making models, corporate citizenship, and culminates with a capstone case competition
- Supported students through answering questions, gauging participation in class, and offering advice for acclimating to Gies

CERTIFICATIONS & INTERESTS

Certifications: Hotshot Summer Associate Certificates in Business Law and Litigation; Legal Research Skills for Practice
Interests: Baking, Concerts, International Travel, Singing (Broadway music and a cappella)

BOSTON UNIVERSITY SCHOOL OF LAW

Name: JORDAN, BRIANNA K
Date Entered: 09/07/2021
Colleges and Degrees:
UNIVERSITY OF ILLINOIS AT URBANA CHAMPAI, B.S. 5/15/2021 WITH HIGHEST HONORS
Other Law School Attendance:

Degree Awarded:
Date Graduated:
Honors:

Academic Record		Credits	Grades
Semester 1 - 2021 -2022			
CIVIL PROCEDURE (B)	BOOTHE	4	B+
CONTRACTS (B)	VAN LOO	4	B+
LAWYERING SKILLS 1	D'AMATO	2.5	A-
TORTS (B2)	ZEILER	4	B
Semester 2 - 2021 -2022			
CONSTITUTIONAL LAW (B)	TSAI	4	A
CRIMINAL LAW (B)	CAVALLARO	4	B
LAWYERING LAB	VOLK ET AL	1	P
LAWYERING SKILLS II	D'AMATO	2.5	A-
MOOT COURT	D'AMATO	-	P
PROPERTY (B)	LAWSON	4	A-
Semester 3 - 2021 -2022			
BUSINESS FUNDAMENTALS	WALKER/TUNG	-	P

Year	Hours	Weighted Points	Weighted Average					
1st	29/30	99.70	3.44					

Semester 1 - 2022 -2023			
CRITICAL RACE THEORY (S)	FEINGOLD	3	A-
JOURNAL OF SCIENCE & TECHNOLOGY LAW - 2L MEMBER		1	CR
JUDICIAL EXTERNSHIP PRGM: FIELDWORK		6	P
JUDICIAL EXTERNSHIP PRGM: SEMINAR	HENRY	1	A
LAWYERING FELLOWS	D'AMATO	2	A
SEX CRIMES (S)	TENNEN	3	A
Semester 2 - 2022 -2023			
ALTERNATIVE DISPUTE RESOLUTION	BAMFORD	3	A-
EVIDENCE	BORENSTEIN	4	B
FEDERAL COURTS	COLLINS	4	CR
JOURNAL OF SCIENCE & TECHNOLOGY LAW - 2L MEMBER		1	CR
LAWYERING FELLOWS	D'AMATO	2	A
PROFESSIONAL RESPONSIBILITY	DONWEBER	3	A

Year	Hours	Weighted Points	Weighted Average	Cumulative Hours	Cumulative Points	Cumulative Average		
2nd	21/33	78.20	3.72	50/63	177.90	3.56		

Semester 1 - 2023 -2024			
ADMINISTRATIVE LAW	BEERMANN	4	*
CIVIL LITIGATION & JUSTICE PRGM: ACCESS TO JUSTICE	MANN	3	*
CIVIL LITIGATION: A2J SKILLS 1 AND PRO RESP	MANN	3	*
FOOD, DRUG & COSMETIC LAW	MILLER	3	*
JOURNAL OF SCIENCE & TECHNOLOGY LAW - 3L EDITOR		2	*
Semester 2 - 2023 -2024			
CIVIL LITIGATION & JUSTICE PRGM: ACCESS TO JUSTICE	MANN	3	*
CIVIL LITIGATION PROGRAM: A2J SKILLS 2	MANN	3	*
FAMILY LAW	SILBAUGH	3	*
PERSUASIVE WRITING: TRIAL LEVEL	D'AMATO	3	*

Year	Hours	Weighted Points	Weighted Average	Cumulative Hours	Cumulative Points	Cumulative Average	Total Hours	Final Average
3rd			0.00	50/63	177.90	3.56	50/63	3.56

1974 Family Educational Rights and Privacy Act Information

The information contained on this transcript is not subject to disclosure to any other party without the expressed written consent of the student or his/her legal representative. It is understood this information will be used only by the officers, employees and agents of your institution in the normal performance of their duties. When the need for this information is fulfilled, it should be destroyed.

Status: (Good Standing is certified unless otherwise noted)

This record is a certified transcript only if it bears an official signature below.

Aida E. Ten

Aida E. Ten, Registrar

Date Printed: 6/12/2023

Boston University School of Law
Transcript Guide

SYMBOLS OR ABBREVIATIONS

AUD	Audit	**H**	Honors
CR	Credit	**NC**	No credit
P	Pass	**F**	Fail
W/D	Withdrawal from course		
*	Indicates currently enrolled		
(C)	Clinical		
(S)	Seminar		
(Y)	Year-long course		

Academic Qualifications – JD Program: The School of Law has a letter grading system in courses and seminars. The minimum passing grade in each course and seminar is a **D**. Beginning with the Class of 2017, a minimum of eighty-five passing credit hours must be completed for graduation. Prior classes required a minimum of eighty-four passing credit hours. The minimum average for good standing is C (2.0) and the minimum average for graduation is C+ (2.3). Prior to 2006 the minimum average for good standing and graduation was C (2.0).

GRADING SYSTEM

1. **Current Grading System** The following letter grade system is effective fall 1995. The faculty has set the following as an appropriate scale of numerical equivalents for the letter grading system used in the School of Law:

A+	4.3	C+	2.3
A	4.0	C	2.0
A-	3.7	C-	1.7
B+	3.3	D	1.0
B	3.0	F	0
B-	2.7		

For all courses and seminars with enrollments of 26 or more, grade distribution is mandatory as follows:

A+	0-5%
A+, A, A-	20-30%
B+ and above	40-60%
B	10-50%
B- And below	10-30%
C+ and below	0-10%
D, F	0-5%

2. **Fall 1995-Spring 2008**

For **first-year courses** with enrollment of twenty-six or more, grade distribution is mandatory as follows:

A+	0-5%
A+, A, A-	20-25%
B+ and above	40-60%
B	10-50%
B- and below	10-30%
C+ and below	5-10%
D, F	0-5%

3. **1991 Changes to Letter Grade System.**

The curve is mandatory for all seminars or courses with enrollments of twenty-six or more.

Grade	Number Equivalent	Curve
A+	4.5	
A	4.0	15-20%
B+	3.5	
B	3.0	50-60%
C+	2.5	
C	2.0	20-35%
D	1.0	
F	0	

The median for all courses with enrollments of twenty-six or more is B. For smaller courses, a median of B+ is recommended but not required.

GRADES FOR COURSES TAKEN OUTSIDE THE SCHOOL OF LAW

Grades for courses taken outside of BU Law are recorded as transmitted by the issuing institution or as CR. Credit toward the degree is granted for these courses and no attempt is made to convert those grades to the BU Law grading system. The grade is not factored into the law school average.

CLASS RANKS

BU Law does not rank students in the JD program with the following exceptions:

Mid-Year Ranks

Effective May 2014, the Registrar is authorized to release the g.p.a. cut-off points to the top 5%, 10%, 15%, 20%, 25% and one-third for the fifth semester in addition to third semester reporting adopted May 2013 and yearly reporting of the same.

Effective January 2013

For students who have completed their third semester, with respect to the cumulative average earned during the fall semester, the Registrar will inform the top fifteen students of their rank and will provide g.p.a. cut-off points for the top 10 percent, 25 percent and one-third of the class. This is in addition to the yearly reporting described below.

Effective May 2011

For students who have completed their first year, the Registrar will inform the top five students in each section of their section rank and will provide grade point average cut-offs for the top 10 percent, 25 percent and one-third of each section.

For students who have completed their second year or third year, with respect to both the average earned during the most recent year and cumulative average, the Registrar will inform the top fifteen students of their rank and will provide g.p.a. cut-off points for the top 10 percent, 25 percent and one-third of the class.

Class of 2008 and subsequent classes through April 2011.

For students who have completed their first year, the Registrar will inform the top five students in each section of their section rank and will provide g.p.a. cut-off points for the top 10 percent of each section.

For students who have completed the second year or third year, with reference to both the second-year or third-year g.p.a. and cumulative g.p.a., the Registrar will inform the top fifteen students in the class of their ranks and will provide g.p.a. cut-off points for the top 10 percent of the class.

Scholarly Categories
(Based on yearly averages only)

Class of 2008 and subsequent classes:

First Year – the top five students in each first-year section will be designated G. Joseph Tauro Distinguished Scholars. The remaining students in the top ten percent of each first-year section will be designated G. Joseph Tauro Scholars.

Second Year – the top fifteen students in the second year class will be designated Paul J. Liacos Distinguished Scholars. The remaining students in the top ten percent of the second-year class will be designated Paul J. Liacos Scholars.

Third Year – the top fifteen students in the third year class will be designated Edward F. Hennessey Distinguished Scholars. The remaining students in the top ten percent of the third-year class will be designated Edward F. Hennessey Scholars.

Graduate Program Transcript Guides

LL.M. in Taxation

Current Grading System:

A+	4.3	C+	2.3
A	4.0	C	2.0
A-	3.7	C-	1.7
B+	3.3	D	1.0
B	3.0	F	0
B-	2.7		

The grade averages of continuing part-time students whose enrollment began before the fall 1995 semester were converted to the new number equivalents.

Fall 1991 to Spring 1995

From the fall 1991 semester through the spring 1995 semester, the following letter grading system was in effect for students who were graduated before the fall 1995 semester:

A+	4.5	C+	2.5
A	4.0	C	2.0
B+	3.5	D	1.0
B	3.0	F	0.0

Current Degree Requirements

Effective May 2016, completion of 24 credits. Minimum average of 2.3 and no more than one grade of D.

Spring 1993 to Fall 2015

Completion of 24 credits. Minimum average of 3.0 and no more than one grade of D.

Fall 1991 to Fall 1993

Completion of ten courses (20 credits). Minimum average of 3.0 (with no more than one grade below 1.0).

LL.M. in Banking and Financial Law

Current Grading System

A+	4.3	C+	2.3
A	4.0	C	2.0
A-	3.7	C-	1.7
B+	3.3	D	1.0
B	3.0	F	0
B-	2.7		

Current Degree Requirements

Effective April 2016, completion of 24 credits with a minimum average of 2.7 and no more than one grade of D or F.

Fall 2012 to Spring 2016

Completion of 24 credits with a minimum average of 3.0 and no more than one grade of D or F.

Fall 1991 to Fall 2012

Completion of ten courses (20 credits). Minimum average 3.0 (with no more than one grade below 1.0).

LL.M. in American Law

Current Grading System:

A+	4.3	C+	2.3
A	4.0	C	2.0
A-	3.7	C-	1.7
B+	3.3	D	1.0
B	3.0	F	0
B-	2.7		

Current Degree Requirements

Completion of twenty-four course credits with at least ten credits per semester. The minimum average for good standing and graduation is 2.3. Minimum course average is 2.0.

LL.M. in Intellectual Property Law

Current Grading System:

A+	4.3	C+	2.3
A	4.0	C	2.0
A-	3.7	C-	1.7
B+	3.3	D	1.0
B	3.0	F	0
C-	2.7		

Current Degree Requirements

Completion of twenty-four course credits with at least ten credits per semester. The minimum average for good standing and graduation is 2.3. Minimum course average is 2.0.

Executive LL.M. in International Business Law

Current Grading System:

A+	4.3	C+	2.3
A	4.0	C	2.0
A-	3.7	C-	1.7
B+	3.3	D	1.0
B	3.0	F	0
B-	2.7		

Current Degree Requirements

Effective Spring 2014, completion of twenty credits with a minimum g.p.a. of 3.0 including the successful completion (CR) of two colloquia.

Grading System prior to Spring 2014

Honors (H)	Credit (CR)
Very Good (VG)	No Credit (NC)
Pass (P)	Fail (F)

Requirements Prior to Spring 2014

Completion of six courses (18 credits) and two colloquia (2 credits) for a total of 20 credits. The minimum passing grade for each course is Pass (P). The minimum passing grade for each colloquium is Credit (CR).

5/2016 rev2

Boston University's policies provide for equal opportunity and affirmative action in employment and admission to all programs of the University.

BU School of Law

Transcript Guide Addendum

JURIS DOCTOR PROGRAM
LL.M. IN AMERICAN LAW PROGRAM
LL.M. IN INTELLECTUAL PROPERTY LAW PROGRAM

Grading System – Distribution Requirements

Effective Fall 2019

For all courses and seminars with enrollments of 26 or more, grade distribution is mandatory as follows:

A+	2-5 %
A+, A	15-25%
A+, A, A-	30-40%
B+ and above	50-70%
B	15-50%
B- and below	0-15%
C+ and below	0-10%
D, F	0-5%

Fall 2020

The distribution requirement for Fall 2020 upper-class courses with 26 or more students was suspended. Upper-level courses with 26 or more students were required to conform to a B+ median.

Effective Spring 2021

For all upper-level courses with an enrollment of 26 or more a B+ median is required with the following additional constraints:

A+	Maximum 5%
A+, A, A-	Minimum 30%
B and below	Minimum 10%
B- and below	Maximum 15%
C+ and below	0-10%
D, F	0-5%

UNIVERSITY OF ILLINOIS URBANA - CHAMPAIGN

Urbana, Illinois 61801

Student Name: Jordan, Brianna Kimora

University ID: 672407038 **Issue Date:** 15 - Mar - 23

Level: Undergrad - Urbana-Champaign **Day - Month of Birth:** 18 - Feb

Most Recent Program(s)
College : Gies College of Business
Major : Supply Chain Management
Marketing

Degree Awarded Bachelor of Science 15-MAY-2021
Degree Information
College : Gies College of Business
Campus : Urbana-Champaign
Major : Supply Chain Management
Marketing
Minor : Criminology, Law, and Society
Inst. Honors: Highest Honors

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
TRANSFER CREDIT ACCEPTED						
FA17		Advanced Placement Tests				
HIST	1--	Test-Based Credit	3.00	PS		
MATH	220	Calculus	5.00	PS		
PSYC	1--	Test-Based Credit	3.00	PS		
RHET	1--	Test-Based Credit	3.00	PS		
RHET	105	Writing and Research	4.00	PS		
SPAN	141	Intro to Spanish Grammar	4.00	PS		
STAT	1--	Test-Based Credit	3.00	PS		
Ehrs: 25.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00						
SP17		Coll of Dupage				
Ehrs: 4.00 GPA-Hrs: 4.00 QPts: 12.00 GPA: 3.00						
SU18		Coll of Dupage				
Ehrs: 8.00 GPA-Hrs: 8.00 QPts: 32.00 GPA: 4.00						
INSTITUTION CREDIT:						
Fall 2017 - Urbana-Champaign						
Gies College of Business						
Business Undeclared						
BUS	101	Business Prof Responsibility	2.00	AH	8.00	
BUS	120	Business Honors Seminar	2.00	AH	8.00	
CMN	101	Public Speaking	3.00	A	12.00	
********** CONTINUED ON NEXT COLUMN **********						

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
ECON	302	Inter Microeconomic Theory	3.00	B+	9.99	
MATH	125	Elementary Linear Algebra	3.00	A-	11.01	
THEA	110	Broadway Musicals	3.00	A+	12.00	
Ehrs: 16.00 GPA-Hrs: 16.00 QPts: 61.00 GPA: 3.81						
Spring 2018 - Urbana-Champaign						
Chancellor's Scholar						
Edmund J James Scholar for Academic Year 2017-2018						
Gies College of Business						
Business Undeclared						
ACE	161	Microcomputer Applications	3.00	A	12.00	
BADM	395	Senior Research II	4.00	A	16.00	
BUS	199	James Scholar Dean's Seminar	1.00	S	0.00	
BUS	302	Principles Prof Responsibility	3.00	A	12.00	
ECON	103	Macroeconomic Principles	3.00	A	12.00	
ECON	202	Economic Statistics I	3.00	A	12.00	
HIST	104	Black Music	3.00	A+	12.00	
Ehrs: 20.00 GPA-Hrs: 19.00 QPts: 76.00 GPA: 4.00						
Deans List						
Fall 2018 - Urbana-Champaign						
Chancellor's Scholar						
Gies College of Business						
Marketing						
ANTH	246	Forensic Science	4.00	A+	16.00	
BADM	199	Honors Seminar	1.00	AH	4.00	
BADM	350	IT for Networked Organizations	3.00	A-	11.01	
ECON	203	Economic Statistics II	3.00	A-	11.01	
FIN	221	Corporate Finance	3.00	A-	11.01	
LAS	291	Global Perspectives-Pre-Depart	0.00	S	0.00	
SOC	100	Introduction to Sociology	4.00	A	16.00	
Ehrs: 18.00 GPA-Hrs: 18.00 QPts: 69.03 GPA: 3.83						
Spring 2019 - Urbana-Champaign						
********** CONTINUED ON PAGE 2 **********						

Recipient: BJORDAN8120@GMAIL.COM

Student email: bjordan8120@gmail.com

Issued to: REFNUM: 20098813417

Meghan Hazen, Registrar

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UNIVERSITY OF ILLINOIS URBANA - CHAMPAIGN

Urbana, Illinois 61801

Student Name: Jordan, Brianna Kimora

University ID: 672407038 **Issue Date:** 15 - Mar - 23

Level: Undergrad - Urbana-Champaign **Day - Month of Birth:** 18 - Feb

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Comments Continued:						
Chancellor's Scholar						
Edmund J James Scholar for Academic Year 2018-2019						
ESADE Business School, Ramon Llull Univ, Spain						
Gies College of Business						
Supply Chain Management						
BADM	310	Mgmt and Organizational Beh	3.00	A	12.00	
BADM	320	Principles of Marketing	3.00	A	12.00	
BUS	388	Change Mgmt for Service Excell	2.00	A	8.00	
BUS	388	Managing Services	2.00	CR	0.00	
BUS	388	Intensive Spanish: Elemental	1.00	A	4.00	
BUS	388	Art & Cltr in Spain & Cataloni	3.00	A	12.00	
BUS	399	Business Study Abroad	0.00	S	0.00	
LAS	292	GlblPerspCrossCulturalContexts	1.00	A	4.00	
Ehrs: 15.00 GPA-Hrs: 13.00 QPts: 52.00 GPA: 4.00						
Deans List						
Fall 2019 - Urbana-Champaign						
Chancellor's Scholar						
Gies College of Business						
Supply Chain Management						
BADM	300	The Legal Environment of Bus	3.00	A	12.00	
BADM	322	Marketing Research	3.00	A	12.00	
BADM	325	Consumer Behavior	3.00	A	12.00	
BADM	335	Supply Chain Management Basics	3.00	A-	11.01	
BADM	375	Operations Management	3.00	A-	11.01	
SOC	275	Criminology	3.00	A	12.00	
Ehrs: 18.00 GPA-Hrs: 18.00 QPts: 70.02 GPA: 3.89						
Spring 2020 - Urbana-Champaign						
Chancellor's Scholar						
Edmund J James Scholar for Academic Year 2019-2020						
Gies College of Business						
Supply Chain Management						
ANTH	224	Tourist Cities and Sites	3.00	AH	12.00	
BADM	311	Leading Individuals and Teams	3.00	A	12.00	
BADM	327	Marketing to Business and Govt	3.00	A+	12.00	
PSYC	199	Is Humanity Doomed or Thriving	3.00	AH	12.00	
********** CONTINUED ON NEXT COLUMN **********						

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
SOC	101	Sociology of Gender	3.00	A+	12.00	
SOC	225	Race and Ethnicity	3.00	A+	12.00	
Ehrs: 18.00 GPA-Hrs: 18.00 QPts: 72.00 GPA: 4.00						
Deans List						
Fall 2020 - Urbana-Champaign						
Chancellor's Scholar						
Gies College of Business						
Supply Chain Management						
BADM	324	Purchasing and Supply Mgmnt	3.00	A+	12.00	
BADM	336	Modeling the Supply Chain	3.00	A	12.00	
BADM	378	Logistics Management	3.00	A-	11.01	
BADM	449	Business Policy and Strategy	3.00	A	12.00	
BUS	415	Senior BH Seminar	1.00	AH	4.00	
FAA	110	Exploring Arts and Creativity	3.00	A+H	12.00	
Ehrs: 16.00 GPA-Hrs: 16.00 QPts: 63.01 GPA: 3.93						
Deans List						
Spring 2021 - Urbana-Champaign						
Chancellor's Scholar						
Edmund J James Scholar for Academic Year 2020-2021						
Gies College of Business						
Supply Chain Management						
BADM	337	Practicum in Supply Chain Mgt	3.00	A+	12.00	
BADM	420	Advanced Marketing Management	3.00	A-	11.01	
CHP	199	Immigration: A Global Phenomen	3.00	A+H	12.00	
SOC	375	Criminal Justice System	3.00	A+	12.00	
SOC	378	Sociology of Law	3.00	A	12.00	
Ehrs: 15.00 GPA-Hrs: 15.00 QPts: 59.01 GPA: 3.93						
Deans List						
********** TRANSCRIPT TOTALS **********						

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	136.00	133.00	522.07	3.92
TOTAL TRANSFER	37.00	12.00	44.00	3.66
OVERALL	173.00	145.00	566.07	3.90

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ACCREDITATION:
Higher Learning Commission of the North Central Association of Colleges and Schools.

ACADEMIC CALENDAR:
The University of Illinois Urbana-Champaign operates on an academic calendar of two sixteen-week semesters and, beginning in 2005, one twelve-week summer term. Prior to 2005, the summer calendar included a four-week summer session (referred to as Intersession prior to 1995) and one eight-week summer session. Beginning December 2014, winter sessions are included between the fall and spring semesters.

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06/07/2022

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Clerkship Applicant Brianna Jordan

Dear Judge Walker:

I am writing to provide my enthusiastic support for Ms. Brianna Jordan's application for a judicial clerkship in your chambers. I have had the pleasure of knowing Ms. Jordan for two years in my capacity as her faculty mentor. More recently, Ms. Jordan has also worked for me as a Research Assistant and has provided research and writing support to ongoing projects at the Boston University Center for Antiracist Research.

While serving as a Research Assistant, Ms. Jordan has assisted on several projects at the intersection of Evidence Law and racism, such as on the racial impact of prior-conviction evidence rules. Ms. Jordan has consistently prepared well-researched and clearly presented legal memoranda after having effectively surveyed the existing case law and literature in the field. Ms. Jordan also can hold well-informed discussions about the issues concerning her research and has a keen eye for detail and nuance while making legal arguments. Whether it is an email, meeting invitation, or phone call, Ms. Jordan is prompt with responses, asks relevant questions about assignments, and adequately checks in with supervisors to ensure clarity in her progress. She has proven to be a very valuable member of our team.

In my capacity as Ms. Jordan's faculty mentor, I have learned that Ms. Jordan excelled in the Lawyering Skills course. She also is a Legal Writing Fellow and continues to mentor current first-year students on strategies for effective research and writing. Additionally, Ms. Jordan served as an intern for the Honorable O. Rogeriee Thompson on the First Circuit. I believe that her background in legal research has prepared her well to assist you in chambers.

I have been very impressed with Ms. Jordan's involvement in the law school community which she makes time for despite a strenuous workload. She currently serves on the executive board for the Women of Color Collaborative and has been proactive about creating an inclusive and safe community for this group of students within BU School of Law. She will serve as the Editor-in-Chief of the Journal of Science and Technology Law during the upcoming school year, and I look forward to learning more about her contributions to the journal as a leader and scholar. Ms. Jordan has much to offer to the legal community and clerking in your court will shape her into a better lawyer and advocate.

In conclusion, I give Ms. Jordan my recommendation without reservations. If you have any questions please feel free to contact me at jgrose@bu.edu or 617-358-6187.

Sincerely,

Jasmine Gonzales Rose
Professor of Law, Boston University
Chair of Policy, BU Center for Antiracist Research

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

Please accept this letter of recommendation on behalf of Brianna Jordan, who I enthusiastically recommend as a law clerk. Brianna possesses a distinct combination of attributes that would make her an asset in any judge's chambers. Brianna is a talented student with a team-first mentality and the ability to take leadership when needed. I base my comments on my experience as Brianna's professor, my opportunity to observe Brianna in multiple leadership roles at BU Law, and my own experience clerking for federal district and appellate judges.

I first met Brianna when she was in my Fall 2022 Critical Race Studies seminar. This is a relatively small course (~16 students) that forces students to engage material that is often intellectually challenging and emotionally fraught. Given these dynamics, I rely heavily on students to help create and maintain a classroom culture committed to analytical rigor and inter-personal generosity and grace.

From day one, Brianna was one of the foremost students who helped construct a learning environment conducive to our collective success. This included different sorts of contributions. On the one hand, Brianna was an immediate and constant contributor. In any class, proactive student engagement is important. But in a small, intimate seminar, proactive student engagement is essential. The class only works if students take a lead pushing and generating the conversation. Brianna did precisely that.

But Brianna did more than simply talk. She engaged the material from a place a thoughtful, curious, and disciplined analysis. Such engagement is not a given. In courses that directly engage politically charged topics, students tend to arrive with strong, emotionally laden opinions. There is nothing wrong with having a strong, emotionally laden opinion—those opinions and emotions are often well founded. But there is a risk that such perspectives and feelings can interfere with the students' collective and individual ability to critically engage assigned readings and to meaningfully interrogate their own assumptions.

This is where Brianna excelled. She did not deny or marginalize her own perspective or experience, but neither did she let her perspective and experience over-determine her engagement with the material and her classmates. In key respects, Brianna showed how to engage challenging material passionately and productively. Beyond offering an exemplary model for her classmates, my sense is this approach also supported Brianna's own learning throughout the semester. Brianna arrived a thoughtful and talented student. But she also left the semester able to engage critical questions with a heightened level of sophistication and precision.

Brianna made one other notable contribution to the Critical Race Theory seminar. Her engagement did not block out other students. To the contrary, she consistently created space for other students to engage—whether or not they agreed with her perspective. Personally, this is one of the most valuable assets a student can bring to a class. In an age when many students are anxious about how their comments will be perceived, it is particularly valuable to have students curate a classroom environment where everyone can trust that their contributions will be taken seriously and engaged on the merits. Brianna did that. We all benefitted for it.

Beyond her terrific contributions and performance in my class, I have observed Brianna's leadership as a member of the BU Law community. Her contributions include her leadership role on the Women of Color Collaborative; her upcoming tenure as the Journal of Science and Technology Law's Editor and Chief; and her role as a Lawyering Fellow supporting first-year students in BU Law's legal research program.

To recap, Brianna possesses a unique combination of qualities that will make her an absolute asset in any judge's chambers. I wholeheartedly endorse Brianna's candidacy. To the extent helpful, I would welcome the opportunity to further sing Brianna's praises over the phone.

Many thanks for considering my thoughts. Please feel free to reach out if you have any questions.

Sincerely,

Jonathan P. Feingold

Jonathan Feingold - jfeingol@bu.edu - 617-353-5793

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Judicial Clerkship Recommendation for Brianna Jordan

Dear Judge Walker:

I am pleased to write this letter of recommendation in enthusiastic support of Brianna Jordan's application for a judicial clerkship. I have had the pleasure of knowing Bri for two years. She was a student in my Lawyering Skills class during the 2021-2022 academic year, and she served as a Lawyering Fellow in my class this year. Lawyering Skills is a yearlong professional skills class with a focus on legal research, writing, and analysis. I have taught in the program for six years. Before joining BU Law, I was a litigation partner at a law firm in Boston. Having worked with many law students and junior lawyers during my career, I would place Bri at the top of the list of people I would hire if I were still in practice. She is smart, diligent, organized, kind, outgoing, and supportive. I simply cannot recommend her highly enough for a clerkship in your chambers.

Bri's strong legal research, analytical, and communication skills will make her an excellent clerk. As a first-year student, Bri fully researched and analyzed complex legal issues ranging from the enforceability of a liability waiver to a criminal defendant's Fourth Amendment rights against unreasonable search and seizure. Bri's written assignments always reflect the significant effort she puts into each step of the writing process, from research, to writing, to proofreading and cite-checking. Her work on the capstone appellate brief assignment involving a defendant's Fourth Amendment rights best exemplifies Bri's abilities. This assignment required students to work with a partner to submit a joint brief on two separate legal issues, with each student arguing one issue. Bri's individual argument that a police search of a defendant's trash in the driveway of his home did not violate the defendant's Fourth Amendment rights was particularly well reasoned and compelling due to Bri's close reading of the facts and effective use of the case law. Bri's work on the joint portions of the appellate brief also demonstrates her close attention to detail and ability to work both independently and as part of a team. Bri formed a close working relationship with her partner that continues to this day, and together they submitted a comprehensive and beautifully formatted brief. Given their work on this assignment, it is not surprising that Bri and her partner have gone on to become the Editors-in-Chief of their respective law journals. Bri's oral argument on this assignment also stood out as one of the best. In fact, Bri performed exceptionally well in all the verbal communication simulations we did in class, including a client interview, a supervisor presentation, and an earlier oral argument on a motion to dismiss. Bri is both a dynamic speaker and a good listener. This powerful combination makes her an effective communicator in a variety of settings, from one-on-one meetings to class discussions and court hearings. Bri has continued to develop her research, analytical, and communication skills through her 2L coursework and her work as a Lawyering Fellow, a member of the Journal of Science and Technology Law (JSTL), and an intern for the First Circuit Court of Appeals. These well-honed skills will undoubtedly serve her well as a judicial clerk.

Bri's consummate interpersonal skills and collaborative nature will also contribute to her success as a clerk. Bri has managed the demands of law school with confidence and optimism. As a 1L, she enthusiastically approached her academic and extracurricular responsibilities without any sign of the malaise that often plagues first-year law students. As a 2L, she shined in her role as a Lawyering Fellow, providing helpful feedback on students' written work and offering valuable guidance and support as a student-mentor. In their written evaluations of Bri, students described her as incredibly helpful, supportive, and patient, and several students of color noted the important role Bri played as a role model for them. Many students who applied to be a Lawyering Fellow next year specifically listed Bri as the reason they decided to apply. I have also benefitted from Bri's generous spirit. She was also always the first person to volunteer to take on extra work as a Fellow, whether holding additional office hours, teaching an extra session on citations, or playing a role in an in-class simulation. And her kind words and encouragement helped me get through a particularly busy spring semester. These qualities will make Bri a helpful and supportive colleague to everyone in your chambers.

Finally, Bri's strong work ethic and time management skills will allow her to meet the demands of a judicial clerkship. These qualities have enabled Bri to excel academically while actively participating in many other activities and responsibilities, including her work as a Fellow, as a staff member and incoming Editor-in-Chief of JSTL, as a Research Assistant, and as secretary of the Women of Color Collaborative. Notwithstanding her busy schedule, Bri meets all deadlines and puts 100% into everything she does. This will make her a productive and successful clerk.

In sum, teaching and working with Bri has been a highlight of my time at Boston University School of Law. She is a very special student, and she will be an exceptional judicial clerk.

Please do not hesitate to contact me at 617-358-6060 or ledamato@bu.edu if you need additional information or have any questions.

Sincerely,

Laura D'Amato
Lecturer and Director, Lawyering Program

Laura D'Amato - ledamato@bu.edu

Brianna Jordan

bjordan@bu.edu • 630-631-6266

357 Faneuil St., Apt. 12A, Brighton, MA 02135

WRITING SAMPLE

I am attaching a copy of an open memo I wrote for my Lawyering Skills course in which I was enrolled in Fall 2021. The memo considers, given the facts, whether an employee could establish a prima facie claim against his employer under the New Jersey Conscientious Employee Protection Act. Professor Laura D'Amato gave feedback and permission to use this memo as a writing sample.

MEMORANDUM

To: Professor D'Amato
From: Brianna Jordan
Date: November 24, 2021
Subject: Mann: CEPA Prima Facie Claim

Question Presented

Can employee Terry Mann establish a prima facie claim under the New Jersey Conscientious Employee Protection Act ("CEPA") against his employer Tricks?

Brief Answer

Mann likely can establish a prima facie CEPA claim because (1) he reasonably believed Tricks was violating a law; (2) he performed a protected "whistle-blowing" activity; (3) an adverse employment action was taken against him; and (4) there was a causal connection between his "whistle-blowing" activity and the adverse employment action.

Facts

Our client, Terry Mann ("Mann"), is a server at a restaurant called Tricks in Winston, New Jersey. As an employee since 2018, Mann is one of the longest tenured servers at Tricks. He really enjoys his job, is well liked by coworkers, and consistently gets positive performance evaluations. Mann prefers the day shifts because he dislikes the "rowdy" atmosphere of night shifts due to the Winston University undergraduate crowd. Mann's manager Ty Lue ("Lue") is aware of this preference and, until recently, did his best not to schedule Mann on Friday and Saturday night shifts. Additionally, Mann is dating Bea Smith ("Smith") who is Tricks' Associate General Counsel for Compliance. Soon after they began dating, Mann and Smith disclosed their relationship to the General Counsel and were permitted to date since Smith is not Mann's supervisor.

As Associate General Counsel, Smith is responsible for ensuring Tricks complies with local, state, and federal law. Logistically, she reports to the General Counsel and has four employees who report to her, including Luke Kennard ("Kennard"). The employee manual states

that employees "are required to report any suspected violation of law or public policy to Luke Kennard, the staff attorney for compliance for New Jersey."

In July 2021, Mann started working Friday nights after two servers suddenly quit. While working these shifts, he noticed the bartenders were not checking the IDs of patrons ordering drinks. When he asked them, the bartenders told Mann that Lue had told them to "be chill" about checking IDs. Lue confirmed this when Mann asked him about it, saying that "the pandemic hit us really hard; you don't want us to have to start laying people off do you," which Mann wrote on a napkin directly after their conversation for recollection. Although Mann felt uncomfortable with this, he went along with it and did not check IDs.

On July 16, 2021, Mann worked the night shift and encountered a seemingly underage student who almost hit him in the face with a bottle and threw up on him. That night, Mann texted Smith to explain what happened with the patron and specifically mentioned Lue's instruction not to check IDs.

The text conversation commenced as follows:

> Mann: Work was rough today, like really rough.
> Smith: Oh no! What happened???
> Mann: Well, there were a ton of kids in there again tonight. A bunch of Winst freshmen who don't know how to handle their liquor.
> Smith: What? Didn't somebody ID them?
> Mann: No. Ty told everyone not to check IDs anymore so we can make up for lost money from the pandemic.
> Mann: I know it's illegal, but I guess there's nothing I can do about it.

On July 20, Lue called Mann into his office and indicated he knew about Mann's conversation with Smith and told Mann he would "make [his] life as difficult as possible while he worked at Tricks" after getting reprimanded by the corporate office. Immediately following this conversation, Lue scheduled Mann to work exclusively during night shifts, which resulted in a reduction in average weekly hours from thirty-eight to thirty-six and a 1% reduction in pay.

Mann is unhappy with his work environment and is concerned about finding new employment. He has inquired about whether he has the right to sue Tricks about this treatment.

Discussion

Under New Jersey's CEPA statute, an employer is not permitted to take retaliatory action against an employee if the employee:

> a. Discloses, or threatens to disclose to a supervisor … an activity, policy or practice of the employer … that the employee reasonably believes:
> i. Is in violation of a law, or a rule or regulation promulgated pursuant to law, … including any violation involving deception of, or misrepresentation to, any … employee [or] former employee.

N.J. Stat. Ann. § 34:19-3(a) (West 2021).

This statute is considered "remedial" legislation and has been construed liberally to achieve its social goals of protecting employees and encouraging them to report illegal and unethical activities in the workplace. See Abbamont v. Piscataway Twp. Bd. of Educ., 650 A.2d 958, 971 (N.J. 1994); see also Dzwonar v. McDevitt, 828 A.2d 893, 900 (N.J. 2003).

An employee can establish a prima facie CEPA claim if they can demonstrate that: (1) they reasonably believed their employer's conduct was violating a law, rule, or regulation; (2) they performed a "whistle-blowing" activity described in CEPA; (3) an adverse employment action was taken against them; and (4) a causal connection exists between the "whistle-blowing" activity and the adverse employment action. Dzwonar, 828 A.2d at 900. Here, Mann demonstrated an objectionably reasonable belief that Tricks was violating a law because he said in his text messages that he knew not checking IDs was illegal. Abbamont, 650 A.2d at 967 (holding that employee had an objectively reasonable belief that employer violated regulation due to his description of the environment and outside sources confirming violation). Thus, Mann will likely be able to bring a prima facie CEPA claim if (1) he performed a "whistle-blowing"

activity, (2) there was an adverse employment action taken against him, and (3) there was a causal connection between the whistle-blowing activity and the adverse employment action.

1. Performed "Whistle-blowing" Activity

To establish a prima facie CEPA claim, an employee must perform a "whistle-blowing" activity. Dzwonar, 828 A.2d at 900. An employee performs a protected "whistle-blowing" activity if they disclose an illegal or unethical activity performed by their employer to a supervisor. § 34:19-3(a). A supervisor is:

> Any individual with an employer's organization (1) who has the authority to direct and control the work performance of the affected employee, (2) who has authority to take corrective action regarding the violation of the law, rule or regulation of which the employee complains, or (3) who has been designated by the employer on the notice required.

§ 34:19-2(d).

A supervisor can take corrective action if the complaint clearly falls within the responsibilities of their role. Abbamont v. Piscataway Twp. Bd. of Educ., 634 A.2d 538 (N.J. Super. 1993), aff'd, 650 A.2d 958 (N.J. 1994) (finding that principal had authority to take corrective action due to responsibility to direct and control work of teachers and check ventilation of machines). This activity does not have to be disclosed to a specific supervisor, including the CEPA designee, but any supervisor that qualifies under the CEPA definition. See Fleming v. Corr. Healthcare Sol., Inc., 751 A.2d 1035, 1039 (N.J. 2000) (holding that employer has no right to limit CEPA's definition of supervisor by requiring employees to submit complaints to a specific supervisor). Additionally, an employee's CEPA complaint may be a valid disclosure even if it is not clear on a specific violation. See Beasley v. Passaic Cnty., 873 A.2d 673, 684 (N.J. Super. Ct. App. Div. 2005) (holding that despite employee not explicitly

stating an exact violation of the law, no magic words are required to establish reasonable belief of illegal activity).

Here, Smith qualifies as a supervisor under CEPA's definition because she has authority to take corrective action with her responsibility to ensure Tricks complies with all local, state, and federal laws. See § 34:19-2(d); see also Abbamont, 634 A.2d 538. Since the texts exchanged between Mann and Smith mention serving alcohol to underaged patrons, Smith had the responsibility of formally reprimanding Lue for his instructions to the staff. Id. Also, Mann was not required to submit his CEPA complaint to Kennard, despite the language in the employee handbook. Fleming, 751 A.2d at 1039. Finally, while Mann did not identify Tricks' exact violation, his language within the text conversation with Smith was sufficiently clear to constitute a disclosure of a violation. Beasley, 873 A.2d at 684. Therefore, Mann likely performed a protected "whistle-blowing" activity when he texted Smith.

2. Adverse Employment Action

To establish a prima facie CEPA claim, an employee must also demonstrate that an adverse employment action was taken against them. Dzwonar, 828 A.2d at 900. A retaliatory action includes the discharge, suspension, or demotion of an employee, or other adverse employment actions taken against them in the terms and conditions of employment. § 34:19-2(e). An adverse employment action changes the terms and conditions of employment if it affects the employment relationship, such as length of the workday, increase or decrease in salary, physical arrangements and facilities, or promotional procedures. Beasley, 873 A.2d at 684 (holding that employer affected terms and conditions of employment when made changes to length of employee's workday and compensation). An action that results in any reduction of compensation constitutes an adverse employment action. See Maimone v. City of Atlantic City, 903 A.2d 1055,

1064 (N.J. 2006) (holding that employer took adverse employment action against employee when change resulted in 3% reduction in compensation). However, actions that simply make employees unhappy do not constitute adverse employment actions. Ivan v. Cnty. Of Middlesex, 595 A.2d 425, 473 (2009) (holding that poor treatment from colleagues not directly related to whistle-blowing activity did not constitute adverse employment action).

Here, the change in Mann's schedule caused a change in the terms and conditions of his employment through a shortening of his workday and loss of pay due to reduced hours. Beasley, 873 A.2d at 684. Additionally, while this change only resulted in a 1% reduction of compensation, any reduction is sufficient to establish an adverse employment action under CEPA. Maimone, 903 A.2d at 1064. Finally, although Mann's unhappiness about the schedule change is not sufficient to establish an adverse employment action, CEPA's social goals of protecting employees emphasizes the weight of his reduction in compensation to constitute an adverse employment action against Mann at Tricks. See Ivan, 595 A.2d at 473; see also Dzwonar, 828 A.2d at 900.

3. Causal Connection

An employee can complete a prima facie CEPA claim if they can establish a causal connection between their "whistle-blowing" activity and the adverse employment action taken against them. Dzwonar, 828 A.2d at 900. Causation can be proven through the presentation of direct or circumstantial evidence that a discriminatory reason was more likely than not a motivating or determining cause of the employer's action. See Romano v. Brown & Williamson Tobacco Corp., 665 A.2d 1139, 1143 (N.J. Super. Ct. App. Div. 1995). Additionally, surrounding circumstances related to the employee's character that affect the employer's view of them may lead to an inference of a causal connection. See Est. of Roach v. TRW, Inc., 754 A.2d

544, 552 (N.J. 2000) (finding that employer's reliance on evaluation with tainted view of employee was sufficient to infer causation to retaliatory action). Also, although it is not sufficient to establish causation, a causal inference may be created through temporal proximity of the employer's knowledge of the activity and retaliatory action. See Crane v. Yurick, 287 A.2d 553, 560 (D.N.J. 2003) (finding that employee's immediate transfer after employer read sealed union letter with employee's support of filing charges against him created causal inference).

Here, Lue's expressing he would "make Mann's life as difficult as possible while he worked at Tricks" creates an inference of a causal connection in the changing of Mann's schedule. Romano, 665 A.2d at 1143. Additionally, the surrounding circumstances of Lue knowing and expressing frustration about the conversation between Mann and Smith further lead to an inference that there is a causal connection between the conversation and the changing of Mann's schedule. Est. of Roach, 754 A.2d at 552. Finally, although Mann had already been working some night shifts prior to the schedule change, the immediate change in his schedule after Lue indicated he knew of Mann's conversation with Smith creates a strong inference that Lue's actions were due to this conversation. Crane, 287 A.2d at 560. Therefore, a causal connection likely exists between Mann's "whistle-blowing" activity and Lue's retaliatory action.

Conclusion

Mann likely can establish a prima facie CEPA claim against Tricks. Mann demonstrated an objectively reasonable belief Tricks violated a law. Additionally, Smith's role fits the definition of supervisor under CEPA, so Mann's disclosure was a proper whistle-blowing activity. Furthermore, although Mann was unhappy with this schedule change, the reduction in pay constitutes an adverse employment action. Finally, the proximity of the conversation with Smith and the change in schedule establishes a causal connection.

Applicant Details

First Name	**Rebecca**
Last Name	**Kamas**
Citizenship Status	**U. S. Citizen**
Email Address	**rrk24@georgetown.edu**
Address	**Address** Street **9115 September Ln** City **Silver Spring** State/Territory **Maryland** Zip **20901** Country **United States**
Contact Phone Number	**512-665-8351**

Applicant Education

BA/BS From	**Georgetown University**
Date of BA/BS	**May 2012**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 19, 2024**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Gunja, Mushtaq
mg1711@georgetown.edu
Robert, Lepore
Robert.Lepore@usdoj.gov
MacDougall, Mark
mmacdougall@akingump.com

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Rebecca Kamas
Silver Spring, MD | 512-665-8351 | rrk24@georgetown.edu

Rebecca Kamas
9115 September Ln
Silver Spring, MD 20901

June 24, 2023

The Honorable Jamar K. Walker
U.S. District Court for the Eastern District of Virginia
Walter E. Hoffman U.S. Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

I am an evening student at Georgetown University Law Center, and I am writing to apply for a clerkship in your chambers for the 2024-2025 term. As an aspiring federal prosecutor with an interest in white-collar enforcement, I want to clerk because it will make me a better trial attorney, and I want to clerk for you, in particular, because of your experience as an AUSA.

Though being an evening student at Georgetown is not the traditional law school experience, it has allowed me to work full-time at DOJ and gain substantial litigation experience. I have over seven years of experience performing merger analysis, drafting memoranda, and working on civil investigations and litigations with the Antitrust Division. Last fall, I took on an internship with the Public Integrity Section of DOJ (while also maintaining my role and duties at Antitrust), allowing me to gain some practical criminal law experience and further develop my functional legal research and writing. On my current detail, I have worked closely with an attorney on editing and rewriting parts of an internal deliberative product, an exercise that has further trained me to prioritize clarity, accuracy, and concision in my writing. Though adding an internship last fall and balancing my current demanding detail with school has been challenging, I am proud of how much I have accomplished while achieving my strongest academic performance at Georgetown to date.

My resume, transcripts, and writing sample are attached. Also included with my application are recommendations from Bobby Lepore, my Section Chief at the Antitrust Division; Mark MacDougall, my Federal White Collar Crime and Sentencing professor; and Mushtaq Gunja, my Criminal Justice, Evidence, and Advanced Criminal Procedure professor. Please let me know if I can provide any additional information or references. I hope to have the opportunity to interview with you. Thank you for your consideration.

Respectfully,

Rebecca Kamas

Rebecca Kamas

Silver Spring, MD | 512-665-8351 | rrk24@georgetown.edu

EDUCATION

GEORGETOWN UNIVERITY LAW CENTER – Washington, DC *Expected May 2024*
Juris Doctor (*Evening Program*)
National Security Law Specialization Program
Georgetown Guantanamo Observers Program
GPA: 3.76; Dean's List 2020-2021

GEORGETOWN UNIVERITY – Washington, DC *May 2012*
Bachelor of Science in Foreign Service, International Politics
Concentration in International Security Studies
Cumulative GPA: 3.52; *Cum Laude*; Phi Alpha Theta History Honor Society

PROFESSIONAL EXPERIENCE

DEPARTMENT OF JUSTICE SPECIAL COUNSEL'S OFFICE (SMITH) – Washington, DC
Paralegal Specialist – Detailee (TS//SCI) *Jan 2023 – Present*
- Provides paralegal support to the special counsel's investigations

DEPARTMENT OF JUSTICE ANTITRUST DIVISION – Washington, DC
Supervisory Paralegal Specialist – Transportation, Energy, and Agriculture Section *June 2020 – Jan 2023*
- Managed, reviewed, coached, and provided performance feedback to team of 14 paralegals
- Worked with section management to ensure all section matters are adequately staffed with paralegals, balancing cases with scheduled depositions, new investigations opened by the section, and multiple simultaneous litigations
- Served as lead paralegal on investigations as section workload required, arranging and conducting interviews, drafting memos, and performing case-specific market research
- Trained 18 new hires in antitrust law, merger filing (HSR) review, case management, and division best practices
- Implemented merger review assignment system to better distribute the section workload and was awarded Assistant Attorney General (AAG) Award for work on merger filing review

DEPARTMENT OF JUSTICE CRIMINAL DIVISION – Washington, DC
Legal Intern (Part time) – Public Integrity Section *Sept 2022 – Dec 2022*
- Performed legal research and drafted memoranda that informed charging or other strategic decisions for public corruption and election crimes prosecutions
- Drafted, prepared, and edited pre-trial briefs and sentencing memoranda

WISCONSIN PROJECT ON NUCLEAR ARMS CONTROL – Washington, DC
Program Associate *May 2019 – June 2020*
- Planned and executed programming visits for Wisconsin Project staff to train foreign customs, licensing, and regulatory officials in the use of a risk management database
- Traveled to Moldova and trained 22 officials in the use of the Risk Report database to screen entities for links to WMD proliferation and sanctions evasion
- Drafted and assembled quarterly and final reports for two State Department grant awards
- Managed subscriber relationships, invoicing, and payments and providing technical support for database users

DEPARTMENT OF JUSTICE ANTITRUST DIVISION – Washington, DC
Paralegal Specialist – Networks and Technology Enforcement Section *Dec 2014 – Dec 2018*
Acting Supervisory Paralegal – Networks and Technology Enforcement Section *Feb 2017 – May 2017*
- Served as lead paralegal on several investigations, drafting memos, scheduling and conducting interviews, performing document review, assisting in deposition preparation, and maintaining case files
- Represented the Division in briefings with Korean, Japanese, Chinese, and German competition authorities and briefed senior leadership on the status of foreign investigations
- Drafted a Civil Investigative Demand and negotiated document production and timing with a large tech company
- Worked with financial expert team on the *United States v. Energy Solutions* trial and received a team AAG Award
- Drafted NCRPA Federal Registry notices and performed a preliminary review of all section merger filings

Record of: Rebecca Rae Kamas
GUID: 885756867

Course Level: Juris Doctor

Degrees Awarded:
B.S. in Foreign Service May 19, 2012
School of Foreign Service
Major: International Politics
Honors: Cum Laude

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	001	97	Civil Procedure David Hyman	4.00	A-	14.68	
LAWJ	002	97	Contracts Anupam Chander	4.00	A-	14.68	
LAWJ	005	76	Legal Practice: Writing and Analysis Jeffrey Shulman	2.00	IP	0.00	

	EHrs	QHrs	QPts	GPA
Current	8.00	8.00	29.36	3.67
Cumulative	8.00	8.00	29.36	3.67

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2021							
LAWJ	004	97	Constitutional Law I: The Federal System Randy Barnett	3.00	B+	9.99	
LAWJ	005	76	Legal Practice: Writing and Analysis Jeffrey Shulman	4.00	A	16.00	
LAWJ	008	97	Torts Gregory Klass	4.00	A	16.00	
LAWJ	611	17	Questioning Witnesses In and Out of Court Jonathan Rusch	1.00	P	0.00	

Dean's List 2020-2021

	EHrs	QHrs	QPts	GPA
Current	12.00	11.00	41.99	3.82
Annual	20.00	19.00	71.35	3.76
Cumulative	20.00	19.00	71.35	3.76

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Summer 2021							
LAWJ	003	06	Criminal Justice Mushtaq Gunja	4.00	A-	14.68	

	EHrs	QHrs	QPts	GPA
Current	4.00	4.00	14.68	3.67
Cumulative	24.00	23.00	86.03	3.74

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	121	07	Corporations Charles Davidow	4.00	A-	14.68	
LAWJ	235	07	International Law I: Introduction to International Law H. Thomas Byron	3.00	A-	11.01	
LAWJ	972	08	National Security Law Todd Huntley	2.00	A	8.00	

	EHrs	QHrs	QPts	GPA
Current	9.00	9.00	33.69	3.74
Cumulative	33.00	32.00	119.72	3.74

----------Continued on Next Column----------

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	1298	08	Global Anti-Corruption Seminar Robert Luskin	2.00	A	8.00	
LAWJ	165	07	Evidence Mushtaq Gunja	4.00	B+	13.32	
LAWJ	1765	50	J.D. National Security Law Specialization Program Todd Huntley		P		
LAWJ	455	97	Federal White Collar Crime Mark MacDougall	3.00	A	12.00	

	EHrs	QHrs	QPts	GPA
Current	9.00	9.00	33.32	3.70
Annual	22.00	22.00	81.69	3.71
Cumulative	42.00	41.00	153.04	3.73

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Summer 2022							
LAWJ	361	06	Professional Responsibility Stuart Teicher	2.00	B	6.00	
LAWJ	415	06	Strategic Intelligence and Public Policy Seminar Dana Dyson	3.00	A-	11.01	

	EHrs	QHrs	QPts	GPA
Current	5.00	5.00	17.01	3.40
Cumulative	47.00	46.00	170.05	3.70

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2022							
LAWJ	032	05	Advanced Criminal Procedure Mushtaq Gunja	2.00	A-	7.34	
LAWJ	1085	05	Sentencing Law and Policy Mark MacDougall	2.00	A	8.00	
LAWJ	1491	113	~Seminar Robin Peguero	1.00	A-	3.67	
LAWJ	1491	114	~Fieldwork 2cr Robin Peguero	2.00	P	0.00	
LAWJ	1491	40	Externship I Seminar (J.D. Externship Program) Robin Peguero		NG		
LAWJ	351	97	Trial Practice Michelle Bradford	2.00	A	8.00	

In Progress:

	EHrs	QHrs	QPts	GPA
Current	9.00	7.00	27.01	3.86
Cumulative	56.00	53.00	197.06	3.72

----------Continued on Next Page----------

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Rebecca Rae Kamas
GUID: 885756867

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2023							
LAWJ	007	97	Property	4.00	A	16.00	
LAWJ	1106	08	Judicial Review of Military Justice Proceedings: Current Issues and Constitutional Perspectives	1.00	P	0.00	
LAWJ	1730	05	Advanced Legal Writing: Practical Lawyering Skills and Strategies	3.00	A	12.00	
LAWJ	1816	05	Breaking Privilege: An In-Depth Analysis of Privilege Issues in the Context of Civil Litigation Valerie Ramos	1.00	P	0.00	
LAWJ	3130	09	Investigating Transnational Criminal Organizations & National Security Threats in Cyberspace	2.00	A	8.00	

	EHrs	QHrs	QPts	GPA
Current	11.00	9.00	36.00	4.00
Annual	25.00	21.00	80.02	3.81
Cumulative	67.00	62.00	233.06	3.76

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Summer 2023							
In Progress:							
LAWJ	1524	06	Statutory Interpretation	3.00	In Progress		
LAWJ	3134	12	The Intersection of Employment and National Security Law	1.00	In Progress		
LAWJ	358	06	Presentation Skills for Lawyers Seminar	2.00	In Progress		

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current				
Cumulative	67.00	62.00	233.06	3.76

End of Juris Doctor Record

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 24, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am extremely pleased to write this letter of recommendation for Rebecca Kamas, an evening student at the Georgetown University Law Center. I have known Rebecca for more than two years, primarily as a student in my Criminal Justice, Evidence, and Advanced Criminal Procedure classes but also in an advising capacity. As her professor, I was able to observe Rebecca's analytical skills, observed her contributions to classroom discussions, and was able to evaluate her writing. As an advisor, I was able to learn a little about her plans for her professional career. Based on my observations, I think Rebecca will make an excellent clerk and will find the clerkship experience invaluable.

Before I tell you a little bit about Rebecca, I should tell you a bit about the courses in which she was enrolled. I try to teach my courses a little differently than most professors; instead of traditional lectures, my courses are primarily problem based. I break the class up into small discussion groups several times a period, which gives me an opportunity to observe students' interactions and to help if students are struggling with a topic. Rebecca's Evidence course was the first class in-person after the pandemic and it was very helpful for me and the students to be able to have some of those small group discussions face to face and to be able to help students quickly who might have follow-up questions. I have been lucky to have Rebecca in three different courses and I feel like I have gotten to know her well.

Rebecca has been a joy to have in class. Her enthusiasm for criminal law and for litigation was clear from the moment she stepped into first year Criminal Justice. This enthusiasm translated into an excellent performance in each of her three courses with me - Rebecca always understood the material at a high level but where she excelled was in her ability to apply the doctrine to hypotheticals and real-world examples. Her ability to translate her work experience into useful examples of how the doctrine applied in the real world made her an incredible asset in class. Her performance in small group settings was especially impressive – although a little quiet, I was struck by how much Rebecca's classmates listened to her and respected her opinions and analysis.

In office hours and in advising sessions, Rebecca has been very thoughtful about how she might transition from Georgetown into a career in a courtroom. Of all of my Georgetown students, Rebecca stands out as somebody who has a clear plan of what she wants to do with her early career and has built her course selection, work experience, and internships in a manner to help her be the best trial lawyer she can be. Rebecca's work in various parts of the Department of Justice has demonstrated her commitment to criminal law. And I know that her most recent experience with the Special Counsel's office investigating former President Trump's behavior on January 6th has been especially meaningful to her and has really solidified her interest in prosecution. She is unlikely to boast about being selected to be part of the Special Counsel's team but it is a real honor to have been asked and demonstrates how much her colleagues at DOJ think of her.

Rebecca's grades in my courses have been solid (two A-s and a B+) but perhaps not quite as strong as her grades in other parts of her transcript. I do not believe that her grades in my courses demonstrate that she was behind her classmates or indicate that she would not be an excellent clerk. The margins in my classes can be quite thin and a single summative assessment often does not fully reflect how much a student has learned in class. Rebecca's demonstration of knowledge of criminal law, criminal procedure, and evidence in class gives me every confidence that she is academically ready to practice.

From what I know of Rebecca, I think a clerkship that gives her the ability to observe different approaches to the art of litigation will be invaluable to her. And I am confident that Rebecca's steadiness, optimism, and good nature will bring a joy to chambers in much the way that she brightened all three of my courses with her.

In short, I recommend Rebecca highly and without reservation. Please feel free to contact me if I can provide any additional information.

Sincerely,

/s/
Mushtaq Gunja
Adjunct Professor
Senior Vice President, American Council on Education
617-899-1862

June 24, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to enthusiastically recommend Rebecca Kamas for a clerkship position in Your Honor's chambers. For the past two and half years, Rebecca has served as the paralegal supervisor in the Transportation, Energy, and Agriculture Section of Antitrust Division of the U.S. Department of Justice. Based on my experience working closely with Rebecca, I believe she has the analytical ability, writing skills, intellectual curiosity, maturity, impeccable judgment, and work ethic to make an excellent clerk.

I should begin by explaining that paralegals in the Antitrust Division have a very different work experience from paralegals who work in private firms. The government's resource constraints leave us heavily reliant on Rebecca and the approximately fourteen paralegals she supervises to perform vital, substantive work on investigations and litigations. Whereas private firms may rely principally on junior associates or contract attorneys for document review, at the Division paralegals typically perform a majority of our document review, which involves more than just ticking through a pre-selected group of documents. To successfully help us find the most relevant and probative documents, our paralegals need to develop a deep understanding of both the facts of the industry we are investigating and the substantive antitrust laws that we enforce. Paralegals are frequently asked to evaluate particular custodians or design searches to identify documents that fit abstract criteria (for example, documents that illustrate the nature of competition between two merging companies). Paralegals are also called upon to write first drafts of memoranda summarizing interviews with market participants, requiring both strong writing skills and an ability to ascertain what information is important to an investigation or litigation. Rebecca is also often the first line of defense against potentially anticompetitive mergers, conducting the initial review of the hundreds of Hart-Scott-Rodino Act merger filing forms that we receive each year and flagging transactions that may raise concerns and need further review by an attorney.

In many ways, Rebecca already functions like one of our trial attorneys. Rebecca has often dived in to provide direct casework support on specific investigations or litigations while superbly managing her supervisory responsibilities. This has included handling investigatory interviews with potential witnesses and working with her attorney colleagues to assess the facts and determine next steps. Rebecca not only masters the facts and keeps the team organized, but also shows a keen understanding of the governing legal framework, enabling her to help us spot potential substantive issues and to contribute to our strategic decision making on an equal footing with the attorneys.

Rebecca has excelled in this challenging and substantive role during a particularly difficult time. Although she had previously served as a line paralegal in the Division's Technology and Digital Platforms section, Rebecca's tenure as paralegal supervisor in our section began just a few months after the start of the COVID-19 pandemic, requiring Rebecca to forge relationships with her new colleagues almost entirely virtually. As the pandemic wore on and we needed to hire new paralegals to replace those departing, Rebecca developed a plan to onboard, train, and integrate the new arrivals in a fully remote environment. As the economy began to recover, there was a record surge in merger filings, and Rebecca developed a new process for managing the intake and assignment of the filings and single-handedly reviewed many of them herself. After the election, new leadership arrived in the Division with the goal to reinvigorate antitrust enforcement and to bring more cases to trial, leading to an increase in workload with no immediate increase in staff. This past year, for instance, the section litigated two major, complex antitrust trials, and we heavily depended on Rebecca's leadership to train and guide our paralegal teams to help us put on polished and professional trial presentations. As a supervisor, Rebecca identifies paralegals who are in need of additional training or support, not only teaching them how to perform their vital day-to-day tasks, but also teaching them the basics of antitrust economics and law so they can effectively contribute to our case development. Rebecca is also responsible for composing the annual reviews for her paralegals and managing performance or conduct issues.

Finally, Rebecca is unfailingly a delight to work with. She accomplished all of her many duties while attending law school in the evenings at Georgetown, and this past semester, while continuing to manage her responsibilities in our office, she served as a part-time legal intern in another component of the Department, further honing her already impressive analytical and writing skills. She doggedly pursued her studies without ever missing a beat in the office. And she did all this while maintaining constant patience, poise, and impeccable judgment even as the demands on her time escalated.

Rebecca would make an exceptional law clerk, and I am confident that she would bring to Your Honor's chambers the same diligence, dependability, and skill that she displays here at the Antitrust Division. Please feel free to contact me at the number below if there is any additional information I can provide about Rebecca's work here at the Division.

Respectfully,

Chief
Transportation, Energy, and Agriculture Section
Antitrust Division
(202) 532-4928
Robert.Lepore@usdoj.gov

Lepore Robert - Robert.Lepore@usdoj.gov

Akin Gump
STRAUSS HAUER & FELD LLP

MARK J. MACDOUGALL
+1 202.887.4510/fax: +1 202.887.4288
mmacdougall@akingump.com

January 31, 2023

Dear Judge:

I am writing in support of the application of Rebecca Kamas for a federal judicial clerkship following her graduation from the Georgetown University Law Center in May 2023.

My acquaintance with Rebecca came about through her participation in courses in Federal White Collar Crime and Sentencing Law & Policy that I teach as an adjunct professor at Georgetown. Rebecca was one of the most active and articulate classroom participants – which was reflected in the grade that she received (A) in both courses. Rebecca is a fine scholar, an articulate advocate for an always well-considered viewpoint, and will soon be a superb lawyer in every respect.

One thing that I have learned as a trial lawyer is to deliver any significant message in no more than three parts. With that lesson in mind, the following are the most important considerations that I believe make Rebecca a strong candidate for a federal judicial clerkship.

The first thing that I would like you to know about Rebecca Kamas as a law student is that she is always prepared, clear in her presentation, never reluctant to offer her cogent perspective and respectful of other points of view. She is also a fine, clean and concise writer whose work requires no second reading in order to be understood and appreciated. That combination is rare among the lawyers with whom I practice every day – and even more difficult to find in a new law graduate.

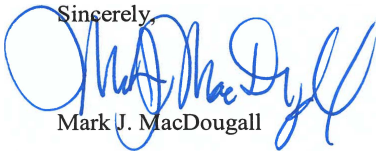
Another consideration that I would suggest be given a good deal of weight in considering Rebecca's candidacy, is the fact that her record of academic success has been achieved while filling a series of responsible, full-time positions with the Department of Justice. I know, from my own experience many years ago, the kind of unrelenting stress that attends students in an evening program at a competitive law school. Rebecca's proven ability to effectively manage a responsible job, while at the same time achieving considerable academic success at Georgetown, should affirm her ability to perform at the highest levels as a federal judicial clerk.

Finally, I think law school drives to the surface the real personalities of students as well as teachers. If there is any truth to that notion, Rebecca will be a genuine pleasure to have as a colleague every day — for her judge, other clerks and courthouse staff alike. In every discussion, both inside and outside of the classroom, Rebecca displays a combination of a

pleasant disposition, personal kindness and a real sense of joy in her work and her life. Those are probably the most difficult characteristics to find in a large pool of newly graduated lawyers and at the same time the most necessary.

So I can recommend Rebecca Kamas to you in the strongest terms for consideration as a judicial clerk. I will be happy to respond to any further inquiries regarding her candidacy.

Sincerely,



Mark J. MacDougall

Rebecca Kamas
Silver Spring, MD | 512-665-8351 | rrk24@georgetown.edu

WRITING SAMPLE

The attached writing sample is a memorandum I wrote while interning with the Public Integrity Section (PIN) of the Department of Justice in Fall 2022. The assignment was to evaluate whether two defendants in different branches of a common conspiracy could be charged together under Fifth Circuit law. The research and analysis in this memo informed the prosecution team's decision on whether to keep the conspiracy charge or continue only under the substantive offenses. After reviewing this memo, the team decided to proceed with the conspiracy count and ultimately convicted both defendants on all counts. I performed all of the research and this work is entirely my own. This memo has been anonymized at PIN's request and is used with their permission.

To: [Redacted] Prosecution Team
From: Rebecca Kamas
Re: Charging Conspiracies in the Fifth Circuit

MEMORANDUM

Question Presented:

I. Under Fifth Circuit law, is the Court likely to permit Defendant One and Defendant Two to both be charged under a single honest services fraud conspiracy charge when, following the death of Cooperator, there is no admissible testimony that they were aware of each other's involvement in the conspiracy?

II. If the Court allows the government to proceed under a single conspiracy theory for both Defendants, under Fifth Circuit law, would a conviction survive appellate scrutiny?

Brief Answer:

I. Likely yes; there is a common objective of honest services fraud of influencing the City Commission in the selection of certain companies for a municipal construction project, an interdependence of parts of the scheme since it would not be successful if the conspirators were unable to secure enough commissioner votes to approve the contracts, and Cooperator was a "key man" who directed both branches of the conspiracy.

II. Yes; the Fifth Circuit is unlikely to overturn an honest services conspiracy fraud conviction on appeal because even if the evidence offered at trial supports a finding of multiple conspiracies, the Court is unlikely to find that such variance prejudiced the Defendants.

STATEMENT OF FACTS

After receiving a notice from the State Commission on Environmental Quality warning that the city's existing infrastructure was operating over capacity, the city commission of City, State approved the issuance of municipal bonds to fund infrastructure projects, including over $25M for several municipal construction projects. Company X was awarded a contract to act as a construction manager for several of the planned construction projects.

Cooperator served as a middleman between Company X, Company Y, Company Z, and certain city commissioners. He accepted at least $4M to pay in bribes to city commissioners to

gain their support for the award of the overarching project management contract to Company X; to approve the award of additional construction projects to Company X, Company Y, and Company Z; and to make other favorable changes to the terms of the contract or the budget allocation.

Cooperator worked with Defendant One to funnel bribes to Defendant One's cousin, City Commissioner A, so that he would use his seat on the city commission to vote to approve the contract awards. Likewise, Cooperator also worked with Defendant Two to funnel bribes to City Commissioner B to gain his support for the projects. Both Defendant One and Defendant Two kept a portion of the bribe payments they funneled to the respective commissioners.

Cooperator was confronted by federal agents and agreed to cooperate with the government. He was going to testify that Defendant One and Defendant Two were aware of their common participation in the conspiracy. However, before the case could proceed to trial, Cooperator died and, for purposes of this memorandum, it can be assumed that the Government has no other admissible testimony proving that Defendant One and Defendant Two knew of the other's participation in the conspiracy.

ANALYSIS

In *Kotteakos v. United States*, the Supreme Court held that it is impermissible to charge defendants in a single conspiracy when their actions are independent and they have no knowledge or reason to know of the illegal actions taken by others. 328 U.S. 750 (1946). Analogizing the structure of this type of conspiracy to a wheel with a hub and series of unconnected spokes, the Court found that despite the similar illegal objectives of each "spoke", none of the conspirators were aided by or had any interest in the success of the others. *United States v. Perez*, 489 F.2d 51, 60 (5th Cir. 1973) (citing *Kotteakos*, 328 U.S. 750). In the more-

than-70-years since *Kotteakos*, the Fifth Circuit has moved away from the hub-and-spoke analogy, instead focusing on a fact-specific inquiry to determine if defendants participated in a single conspiracy or distinct conspiracies. "Finding that they impede rather than facilitate analysis of the 'single conspiracy—multiple conspiracy' issue, we eschew utilization of figurative analogies such as 'wheels,' 'rims' and 'hubs,' which are often used to describe the nature of complex conspiracies." *United States v. Elam*, 678 F.2d 1234, 1246 (5th Cir. 1982) (citing *Perez*, 489 F.2d at n11). Instead, the Fifth Circuit has developed and relied on a three-factor test that is used to determine if one or multiple conspiracies exist. Courts in the Fifth Circuit consider: (1) the existence of a common goal, (2) the nature of the scheme, and (3) the overlapping of the participants in various dealings. *United States v. Morrow*, 177 F.3d 272, 291 (5th Cir. 1999) (per curiam); *United States v. Richerson*, 833 F.2d 1147, 1153 (5th Cir. 1987).

I. Fifth Circuit test for counting conspiracies

A. Common Purpose

In order to find a single conspiracy, "there must be one objective, or set of objectives, or an overall objective to be achieved by multiple actions." *Perez*, 489 F.2d at 62 (5th Cir.1973). Courts in the Fifth Circuit have broadly defined the common purpose element of the conspiracy counting test. *Morrow*, 177 F.3d at 291; *see also United States v. Morris*, 46 F.3d 410, 415 (5th Cir. 1995) (internal quotation marks omitted) ("In fact, one panel has remarked that given these broad common goals the common objective test may have become a mere matter of semantics.")

In *United States v. Leach*, the Fifth Circuit considered whether homeowners who did not participate in the same transactions in an insurance fraud scheme should be tried together despite their claim that they had no connection with, or knowledge of, each other. 613 F.2d 1295 (5th Cir. 1980). The Fifth Circuit decided that joinder of defendants was proper because each

participated in the single charged conspiracy. *Id.* at 1298-99. Reasoning that a jury could find that the defendant-appellants knew or should have known that the conspiracy had a scope beyond the single insurance claim in which each participated, the court found a common purpose of committing home insurance fraud. *Id.* at 1299.

In considering conspiracies that span long time frames, diverse participants, varied means, or multiple objectives, courts in the Fifth Circuit have also found common purpose:

(1) in "mutual enrichment" in a mail fraud conspiracy involving false representations about silver ore options sales, refining contracts, and loan fraud (*United States v. Becker*, 569 F.2d 951, 955 (5th Cir. 1978));

(2) in deriving personal gain from fraud against a single company (*Richerson*, 833 F.2d at 1153);

(3) where the coconspirators "shared a common goal of enriching themselves by profiting from the leveraged selling and reselling of real estate along I–30" (*United States v. Jenson*, 17 F.3d 745, 761 (5th Cir. 1994));

(4) in deriving personal gain through real estate fraud (*United States v. Beacham*, 774 F.3d 267, 273-74 (5th Cir. 2014)); and

(5) in personal gain from the sale of drugs (*United States v. Dawes*, 222 F. App'x. 399, 402 (5th Cir. 2007)).

In the present case, the Court is likely to find that Defendant One and Defendant Two operated with a common purpose. Both Defendants had the goal of bribing officials on the same city commission to vote to approve specific contracts that favored Company X, Company Y, and Company Z. Like the court in *Leach*—which found the defendants had a common purpose of

enriching themselves through insurance fraud—here, the Court is likely to find that Defendants had a common purpose of self-enrichment through honest services fraud.

B. Nature of the scheme

The Fifth Circuit has found that the nature of a scheme points to a single conspiracy where the activities engaged in by one part of the conspiracy benefit or support the other parts. "[I]in considering the nature of the scheme, a single conspiracy 'will be inferred where the activities of one aspect of the scheme are necessary or advantageous to the success of another aspect or to the overall success of the venture.'" *Beacham*, 774 F.3d at 274 (quoting *Morris*, 46 F.3d at 415 (5th Cir. 1995)); *Elam*, 678 F.2d at 1246.

In *United States v. Perez*, the Fifth Circuit considered whether a scheme that involved a series of staged automobile accidents with different participants in different locations constituted a single conspiracy. 489 F.2d 51. Finding that testimony presented at trial aligned with the "common sense of the scheme", the court reasoned that the conspiracy would have *had* to involve a series of staged accidents for the rewards to be high enough to justify the risk for the necessary doctors and lawyers. *Id.* at 62-63. Finding a common purpose and not just a series of "one shot" events, the Fifth Circuit determined that the common reliance on the doctors and lawyers meant that none of the individual participants in any of the staged crashes could have been unaware that there must have been other accidents. *Id.*

Where there is no mutual benefit or overarching plan, courts in the Fifth Circuit are unlikely to find an interdependent or common nature of the scheme. *Compare Morrow*, 177 F.3d 272 (5th Cir. 1999) (finding the sales managers at different mobile home sales lots were each necessary "cogs" in a single larger conspiracy to commit bank fraud through short down payments and falsifying customer information directed by the owners of the franchise) *with*

United States v. Sutherland, 665 F.2d 1181 (5th Cir. 1981) (concluding that a scheme where a judge conspired with two different individuals in different time frames to engage in identical frauds related to the disposition of traffic tickets were not sufficiently interdependent to be considered a single conspiracy).

Courts have reached varying results on whether identical schemes are evidence of a common nature. *Compare Sutherland,* 656 F.2d 1181 (finding an identical scheme was not determinative) *with Leach*, 613 F.2d 1295 (5th Cir. 1980) (finding a common nature where the homes involved in the insurance fraud scheme were all overvalued, never occupied by their owners, destroyed in similar explosions, lacked similar records, and shared a common transaction structure) *and Beacham*, 774 F.3d 267 (5th Cir. 2014) (finding a single conspiracy in a real estate fraud scheme where two coconspirators ended their association and each formed independent companies that had identical operations).

In the present case, the Court is likely to find that the actions taken by Defendant One to pay bribes to City Commissioner A and the actions taken by Defendant Two to pay bribes to City Commissioner B were interdependent rather than merely identical schemes. The approval of the contract awards required the votes of a majority of the city commissioners. Bribing only a single commissioner would have been insufficient on its own. Accordingly, the Court is likely to find that Defendants knew or should have known that there were multiple commissioners being bribed to facilitate the contract awards.

C. Overlapping Participants

Courts in the Fifth Circuit are more likely to find a single conspiracy when there are multiple overlapping and interconnected participants. *See, e.g.*, *Morris*, 46 F.3d at 416. However, the Fifth Circuit has also explained that a court needn't find that each member participated in

every transaction to find a single conspiracy. *Id.* "[W]here it is shown that a single 'key man' was involved in and directed illegal activities, while various combinations of other defendants exerted individual efforts toward a common goal, a finding of the existence of a single conspiracy is warranted." *Elam*, 678 F.2d at 1246. In *United States v. Morrow*, the court considered whether sales managers at different mobile home sales locations were part of the same conspiracy to commit bank fraud. 177 F.3d at 302. The court decided that the Government didn't have to show the sales managers were aware of each other, in part because the two franchise owners and a common banker were "key men" orchestrating the common goal. *Id.; see also Perez*, 489 F.2d at 58 (where a core group of three individuals formed the "hub" of the conspiracy); *Richerson*, 833 F.2d at 1154 (determining that "[a]ll the government had to show to establish overlapping participants was that [the two coconspirators at different companies] were conspiring with Richerson, a core conspirator, to pay bribes").

However, when there is a sole overlapping participant, but the other conspirators are separated from each other by time, the court is unlikely to find a single conspiracy. In *United States v. Sutherland*, the Government alleged a common conspiracy where two individuals each agreed to participate in a bribery scheme with Sutherland, a local judge. 656 F.2d 1181. The two individuals participated in identical schemes in different years and the Government alleged no contact or agreement between the two. *Id.* at 1194. The Fifth Circuit found Sutherland's overlapping involvement alone was not sufficient for a finding that they were all involved in the same scheme. *See also United States v. Levine*, 546 F.2d 658 (5th Cir. 1977) (concluding that two one-time commercial transactions with a common filmmaker was not a sufficient link to allege a single conspiracy included two customers of obscene films who were otherwise unaware of the other).

Here, Defendants are connected by a key man, Cooperator, who coordinated the bribes to City Commissioner A through Defendant One and City Commissioner B through Defendant Two. The schemes overlapped not only through the involvement of Cooperator, but also the scheme was ongoing over several years, as was the participation of both Defendants. Rather than a single key man running identical but otherwise unrelated schemes like in *Southland*, the participation of the key man was more like the common mobile home franchise owners in *Morrow.* Cooperator, like the franchise owners, simultaneously directed the activities of the Defendants in committing the honest services fraud.

II. Variance Between a Single Charged Conspiracy and Multiple Conspiracies Proved at Trial

A. The Existence of a Single Conspiracy Is a Question of Fact for the Jury

The jury should determine whether the evidence presented at trial establishes a single conspiracy or multiple conspiracies. *United States v. Mitchell,* 484 F.3d 762, 769 (5th Cir. 2007); *Beacham*, 774 F.3d at 273. The court must "affirm the jury's finding that the government proved a single conspiracy 'unless the evidence and all reasonable inferences, examined in the light most favorable to the government, would preclude reasonable jurors from finding a single conspiracy beyond a reasonable doubt.'" *Mitchell,* 484 F.3d at 769 (quoting *Morris*, 46 F.3d at 415).

Even if the evidence at trial shows multiple conspiracies where a single conspiracy has been charged, that does not itself create a material variance with the indictment. "[A]t most, such evidence creates a fact question and entitles the defendants to a jury instruction on the possibility of multiple conspiracies." *Sutherland*, 656 F.2d at n5. In *Morrow*, where the knowledge of activities at other sales locations by various alleged conspirators was in dispute and left to the

jury, "as a safeguard against prejudice, the jurors were cautioned in the instructions from finding guilt if the proof presented by the Government established any conspiracy other than that charged in the indictment." 177 F.3d at 291-92; *see also Mitchell*, 484 F.3d at 770-71 ("[T]he variance does not necessitate reversal since he has not demonstrated that it affected his substantial rights. . . . Furthermore, any risk of prejudice was minimized by the district court's instruction to the jury that it must acquit if it were to find that a defendant was not a member of the charged conspiracy, even if it were to find that the defendant was a member of some other conspiracy").

B. Standard on Appeal

Even if the Court here does find variance between the single conspiracy charged and the proof offered at trial, it would not be grounds for reversal unless the Defendants demonstrate it prejudiced their substantial rights. *Mitchell*, 484 F.3d at 770-71. In the single versus multiple conspiracy context, the most common prejudice would be the transference of guilt from one co-defendant to another. *Id.* "[W]here the indictment alleges a single conspiracy, and the evidence established each defendant's participation in at least one conspiracy a defendant's substantial rights are affected only if the defendant can establish reversible error under general principles of joinder and severance." *Jensen*, 41 F.3d at, 956; *see also United States v. Faulkner*, 17 F.3d 745, 762 (5th Cir.1994).

In *Sutherland*, after finding that the Government improperly charged a single conspiracy where two distinct conspiracies existed, the court explained that such an error would require reversal under *Kotteakos* if it affected the substantial rights of the defendants. 656 F.2d at1194-95. The Fifth Circuit analyzed the prejudicial effect under *Berger v. United States,* 295 U.S. 78 (1935), and *Kotteakos*, and found the facts in *Sutherland* distinguishable. In *Kotteakos,* thirty-

two defendants were charged together and the evidence established as many as eight separate conspiracies. 656 F.2d at 1196. In *Sutherland*, though, the court found that the defendant's substantial rights were not injured. The Fifth Circuit held that reversal was not required because: (1) the small number of defendants decreased the danger of jury confusion, (2) distinct evidence about each participant's conspiracy with neither set of evidence directly contradicting any portion of the defense as to the other conspiracy, and (3) "most importantly, the government introduced overwhelming evidence of guilt as to all three defendants, and this evidence would have been admissible in two separate trials on individual conspiracy counts." *Sutherland*, 656 F.2d at 1196.

III. Conclusion

The Government will likely succeed in arguing that Defendant One and Defendant Two can be properly joined in a single conspiracy due to the common goal approving contracts that benefited Company X, Company Y, and Company Z; the similar and interdependent nature of the acts taken by both Defendants; and the connection through a "key man" in the form of Cooperator. However, in order to guard against arguments of impermissible joinder on appeal, care should be taken to distinguish the facts from those in *Kotteakos*, and through a cautionary instruction to the jury, if appropriate, regarding the transference of guilt.

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Date of BA/BS	**May 2018**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 19, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**The Georgetown Law Journal**
Moot Court Experience	**No**

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